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No. 99-___

In The
Supreme Court of the United States
October Term, 1999

Maria Hsia,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether knowledge of illegality is required to satisfy the element of "willfulness" in a criminal prosecution under 18 U.S.C. §§ 2(b) and 1001 concerning campaign contributions regulated by the Federal Election Campaign Act ("FECA"), an issue on which the Courts of Appeals are split.

2. Whether Congress intended that an alleged violation of the carefully calibrated campaign finance regime established by the FECA must be prosecuted exclusively pursuant to FECA's criminal enforcement provisions.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Maria Hsia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 176 F.3d 517 and reproduced in the Appendix ("App.") 1a-19a bound with this petition. The opinion of the district court dismissing Counts Two through Five of the indictment is reported at 24 F. Supp. 2d 33 (App. 53a-113a); that court's opinion on the standard of willfulness in the federal election context is reported at 24 F. Supp. 2d 14 (App. 20a-52a). A

related opinion on the standard of willfulness is found at *United States v. Trie*, 21 F. Supp. 2d 7 (D.D.C. 1998).

JURISDICTION

The court of appeals entered its judgment on May 18, 1999. Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 2, 1999. App. 117a-118a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 2 U.S.C. § 441f of the Federal Election Campaign Act ("FECA") provides:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

Title 2 U.S.C. § 437g, which includes FECA's criminal enforcement provision, is reproduced (App. 120a-128a).

The following parts of Title 18 are relevant to this Petition:

§ 1001(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . .

(2) makes any materially false, fictitious, or fraudulent statement or representation; . . .

shall be fined under this title or imprisoned not more than 5 years, or both.[1]

§ 2(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

INTRODUCTION

This case presents fundamental questions regarding governmental regulation of campaign finance, a context that, as this Court repeatedly has recognized, is of paramount constitutional importance.

First, the case presents the question whether, in a "causing-another-to-make-false-statements" prosecution under 18 U.S.C. §§ 2(b) and 1001 in the sensitive and complex area of campaign finance regulated by FECA,

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[1] Although this, the current version of 18 U.S.C. § 1001, applies only to one of the five "causing false statements" charges, the differences between the current and the preceding version of the statute are immaterial to this case. *See* App. 5a, n2.

"willfulness" requires knowledge of illegality. The courts of appeals are squarely split on this question, with the Third Circuit finding such a requirement and the D.C. Circuit, in this case, explicitly rejecting the Third Circuit's holding. In light of the complexity and constitutional sensitivity of FECA, as well as the nature of the conduct involved, only a requirement of knowledge of illegality provides adequate notice and prevents unfairly trapping the innocent.

Second, the case presents the threshold question whether First Amendment concerns and congressional intent require that FECA violations be enforced pursuant to the carefully calibrated and reticulated FECA statute, thus precluding prosecution under 18 U.S.C. §§ 2(b) and 1001. This unresolved but ultimately controlling issue presents critical questions regarding congressional intent and the First Amendment in the campaign finance context. Under this Court's precedents, a prosecution based on FECA violations may not be brought under 18 U.S.C. §§ 2(b) and 1001 because Congress intended that FECA's First Amendment sensitive regime occupy the field.

These related issues are of recurring importance and warrant this Court's review.

STATEMENT

Petitioner has been indicted for "causing false statements" in Federal Election Commission ("FEC") disclosure reports in connection with her solicitation of campaign contributions for candidates and campaigns she supports. Although FECA comprehensively regulates contributions, political committee disclosure reports of contributions, and the enforcement of all FECA violations, petitioner was not charged under FECA.

Statutory Framework

Since 1907, Congress has enacted numerous statutes intended to regulate federal campaign financing, an area of well-recognized First Amendment sensitivity. *See, e.g.*, *United States v. UAW*, 352 U.S. 567, 568-83 (1957); *United States v. CIO*, 335 U.S. 106, 120 (1948). It was not until 1972, however, that Congress enacted a comprehensive regulatory scheme, the Federal Election Campaign Act of 1971, closing many of the loopholes in the earlier laws. Pub. L. No. 92-225, 86 Stat. 3 (1972). In 1974, following the Watergate scandal, FECA was substantially revised and expanded. *See* Pub. L. No. 93-443, 88 Stat. 1263 (1974).

FECA, described by this Court as "[t]he intricate statutory scheme adopted by Congress to regulate federal election campaigns," reached the Court in *Buckley v. Valeo*, 424 U.S. 1, 12 (1976). Recognizing that "[t]he Act's contribution and expenditure limitations," as well as its disclosure requirements, "operate in an area of the most fundamental First Amendment activities," the Court held that numerous FECA provisions were unconstitutional restrictions on First Amendment rights to political expression and association. *Id.* at 14, 64. The Court made clear that strict scrutiny of the FECA provisions was required because the area was "permeated by First Amendment interests;" otherwise, the Court warned, the statute might "deter those who seek to exercise protected First Amendment rights." *Id.* at 41, 77.

In response, Congress in 1976 again significantly amended FECA, with the express purpose of adhering to *Buckley's* constraints. Pub. L. No. 94-283, 90 Stat. 475 (1976). Significantly, Congress centralized and reorganized FECA's enforcement scheme. "[G]uided" by certain "basic principles," in particular the principle that "election campaigns are the central expression of this country's

democratic ideal," Congress made clear in its post-Buckley revisions that it intended to "promote greater uniformity and certainty in enforcing the law." H.R. Rep. No. 94-917, at 2-4 (1976). It was "essential in this sensitive area," Congress emphasized, to "simplify and rationalize" the "system of administration and enforcement." *Id.* at 3.

Thus, Congress eliminated all felonies, transferring the numerous criminal code provisions regulating federal political activity from Title 18 to FECA's Title 2, and "place[d] its reliance on civil enforcement" (particularly conciliation) and disclosure, "except as to substantial violations," that is, serious "knowing and willful violations" of Title 2 committed within a three-year statute of limitations. H.R. Rep. No. 94-917, at 3-4. *See also* S. Rep. No. 94-677, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 940.

The level of intent required to support a violation was the centerpiece of the 1976 FECA amendments. The "knowing and willful" intent requirement expressly was intended to limit liability to cases in which "the acts were committed with a knowledge of all the relevant facts and a recognition that the action is prohibited by law." H.R. Rep. No. 94-917, at 4 (1976).[2] Thus, the Act provided in a consolidated penalty provision that "*knowing and willful*" violations of FECA involving the making, receiving or reporting of a contribution or expenditure over $1000 could

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[2] Then Representative Rostenkowski raised the concern that the earlier FECA "provid[ed] harsh penalties for what may be innocent and often unknowing violations of its more technical requirements . . . . [W]e have arrived at a very sorry state when a taxpayer becomes a criminal because he did not know that he must disclose certain information . . . " 122 Cong. Rec. H8577 (Mar. 30, 1976).

be subject to a *misdemeanor* penalty.[3] Other "knowing and willful" violations, including those that did not reach the monetary jurisdictional floor, were subject to FEC actions, from conciliation to a civil suit seeking a substantial civil penalty. App. 121a-123a. Violations not committed in a "knowing and willful" manner could be addressed via conciliation or a relatively modest penalty. App. 122a. The comprehensive enforcement scheme applied to all of FECA's provisions, including the provision that "[n]o person shall make a contribution in the name of another person." 2 U.S.C. § 441f.[4]

For twelve years, from 1976 through 1988, the FEC and the Department of Justice addressed violations of the FECA regime, including the prohibition on "contributions in the name of another," exclusively pursuant to FECA's enforcement provisions.[5] The FEC investigated the vast majority of alleged contributions in the name of another, proceeding either with conciliation or with civil action in federal district court. As contemplated by Congress and the

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[3] The misdemeanor penalty imposed by the 1976 FECA Amendments codified at 2 U.S.C. § 441j (1976) (repealed 1980), was made part of Section 437g in 1979 in substantially the same form. *See* 2 U.S.C. § 437g(d)(1)(A); App. 126a-127a.

[4] Originally enacted as part of Title 2 in the 1971 FECA, this provision was moved to Title 18 in 1974. It was placed back in Title 2 after *Buckley*, accompanied by the other Title 18 campaign finance felony and misdemeanor provisions.

[5] The Memorandum of Understanding ("MOU") between the Department of Justice and the Federal Election Commission always has assumed that the Department would prosecute serious FECA violations only under FECA's misdemeanor enforcement provision, 2 U.S.C. § 437g(d). *Department of Justice Manual*, 9-1384.126 (1995-3 Supp.).

statute, the Attorney General prosecuted as misdemeanors serious "*knowing and willful*" "contributions in the name of another" over $1000 ($2000 after the 1979 amendments) that had been committed within the three year statute of limitations.[6]

During that period, the Department, recognizing the "presence of First Amendment overtones in nearly all FECA violations," observed that "[c]riminal violations of the FECA differ from noncriminal violations . . . principally in the degree of criminal intent involved." U.S. Department of Justice, *Federal Prosecution of Election Offenses* 40-41 (4th ed. 1984) ("1984 Manual").[7] In 1988, however, the Department radically changed its approach because FECA had "many features that render it difficult to use," including FECA's "knowing and willful" requirement,[8] the monetary jurisdictional floor, the venue requirement, and the three-year statute of limitations. 1988 Manual at 73-75. The 1988

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[6] *See, e.g., United States v. Passodelis*, 615 F.2d 975 (3rd Cir. 1980); *United States v. Hankin*, 607 F.2d 611 (3rd Cir. 1979).

[7] "[T]he substantive provisions of the Act are [largely] regulatory *malum prohibitum*," and thus, in the Department's view during that time, "require[ ] proof either that [a] would-be [FECA] defendant had an active awareness that he was violating the law when he committed the transgression in question, or that he was otherwise acting with 'evil' motive or purpose." U.S. Department of Justice, *Federal Prosecution of Election Offenses* 30 (2d ed. 1980) ("1980 Manual"). The 1980 Manual confirmed that there is "nothing inherently wrongful or socially deviant about the vast majority of the conduct covered by the campaign finance laws." *Id.*

[8] The Department was particularly unhappy that FECA requires a high level of intent-knowing and willful activity-"and yet it provides for only misdemeanor sanctions." U.S. Department of Justice, *Federal Prosecution of Election Offenses* 75 (5th ed. 1988) ("1988 Manual").

Manual recommended that prosecutors "attempt to use alternative prosecutive theories to reach FECA crimes wherever possible" and proposed the notion that a conduit contribution is "capable of being characterized as a violation of the federal false statements statute." *Id.* at 75-76.[9] Soon thereafter, the Department began to use the new "causing false statements" theory to punish "contributions in the name of another" as felonies.[10]

The Proceedings In This Case

1. The Indictment. On February 18, 1998, the Campaign Financing Task Force, created in late 1996 to investigate alleged fundraising violations during that election cycle, issued its first indictment, charging Petitioner Maria Hsia with felonies based on her solicitation of campaign contributions alleged to be in violation of FECA's prohibition on contributions in the name of another.[11] Count

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[9] According to the Department, a campaign contributor "who wishes to give an excessively large sum to a federal candidate. . .usually employs conduits to pose as contributors." 1988 Manual at 76. This conduct causes the campaign treasurer, who receives checks from the conduit contributors to report contributions to the FEC from the conduits themselves, as opposed to the true source of the funds. Thus, in the Department's view, the source of the funds "willfully caused" false information to be filed with the FEC. 1988 Manual at 76. This is essentially the theory employed in this and other "causing false statements" prosecutions.

[10] *See United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990); *United States v. Goland*, 897 F.2d 405 (9th Cir. 1990); *United States v. Ballori*, No. 91-0607 (E.D.N.Y.) (Indictment Jun. 6, 1991); *United States v. Curran*, 20 F.3d 560 (3rd Cir. 1994).

[11] The Task Force, which has brought nineteen indictments and informations, consistently utilizes a "causing false statements" theory based solely on "contributions in the name of another" *See, e.g., United*

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One, which charged conspiracy to defraud the United States, now has been abandoned by the Department and dismissed on its own motion, leaving only five "causing false statements" counts. *See* App. 116a. Those counts were dismissed by the district court (App. 114a-115a) but reinstated by the court of appeals on the government's appeal. *See* App. 16a.

Counts Two through Six, the counts involved in this petition, charged Ms. Hsia with "knowingly and willfully causing false statements" in FEC disclosure reports filed by political committee treasurers, in violation of 18 U.S.C. §§ 2(b) and 1001. The alleged "false statements" consist of the names of the individuals listed in FEC reports who signed contribution checks to candidates and political parties. Ms. Hsia "caused" the "false statements," the indictment alleges, by soliciting contributions for political candidates and political campaigns she supported when she "knew" that the individuals who signed the checks were not the actual source of the funds.[12] The indictment did not

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States v. Jiminez, Criminal No. 99-00281 (S.D. Fla.) (Indictment Apr. 15, 1999); *United States v. Haney*, Criminal No. 98-0383 (D.D.C.) (Indictment Nov. 4, 1998); *United States v. Trie*, 21 F. Supp. 2d 7 (1998). Many of the indictments secured by the Task Force also charge violations of 2 U.S.C. § 441e, the prohibition on the solicitation of contributions by foreign nationals. *See Trie*, 21 F. Supp. 2d; *United States v. Lee*, Criminal No. 99-327 (C.D. Cal.) (Indictment Apr. 6, 1999); *United States v. Glicken*, Criminal No. 98-0240 (D.D.C.) (Indictment July 9, 1998). Ms. Hsia was not charged with *any* violations of 2 U.S.C. § 441e, conduct which unquestionably permeated the 1996 election cycle and led to the ultimate creation of the Task Force.

[12] In many instances, the persons who signed the contribution checks were monastics from the Buddhist Hsi Lai Temple, an unindicted

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allege that Ms. Hsia submitted any document or form to the FEC, that she misstated any fact to the FEC orally or in writing, or that she made any representations of any kind to the political treasurers who submitted the FEC reports in question.

2. The District Court Decision. Prior to considering the motions to dismiss the "causing false statements" counts, the district court, relying on the Third Circuit's decision in *United States v. Curran*, 20 F.3d 560 (1994), held that "'when a [solicitor or] contributor is charged as an aider and abettor in the federal election context for causing an intermediary to make a false statement to the FEC, the prosecution must prove that 'defendant knew of the [political party] treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful.'" App. 24a. *United States v. Trie*, 21 F. Supp. 2d 7, 14 (D.D.C. 1998). Thereafter, relying primarily on First Amendment and due process concerns, the district court dismissed all of the "causing false statements" counts. App. 94a-113a.

3. The Court of Appeals Decision. The government appealed the dismissal of the indictment, and the D.C. Circuit reversed. The D.C. Circuit disagreed with the district court's interpretation of the requirement for willfulness in the campaign finance context. The court explicitly rejected the decision of the Third Circuit in *Curran*, expressing its approval instead of *United States v. Gabriel*, 125 F.3d 89, 101 (2d Cir. 1997), a Second Circuit decision concerning

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co-conspirator, who later received funds from the Temple, as they do for all personal and other expenses.

willfulness in a non-election law context. *See* App. 6a. The court held that the government need not prove Ms. Hsia knew her acts to be unlawful and that the Third Circuit's holding, which would have required such knowledge, went "too far" and had misinterpreted this Court's precedents. *Id.* Instead, the court concluded, the government need only prove Petitioner knew the statements were false and that she intentionally caused them. *See id.*

The court of appeals also found that the First Amendment was in no way implicated by the indictment (App. 12a) and rejected the view, adhered to by the FEC and the Department of Justice for the first dozen years of FECA's existence, that FECA's reticulated statutory regime provides the exclusive means of prosecuting FECA contribution violations. *Id.* at 13a-14a. Accordingly, the court rejected the claim that a prosecution for a FECA violation must utilize FECA's enforcement procedures and may not proceed under 18 U.S.C. §§ 2(b) and 1001. *Id.*

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve The Square Split In The Circuits Regarding The Meaning Of "Willfulness" In The FECA Context

This Court should grant certiorari to resolve the direct and irreconcilable conflict between the decisions of the D.C. Circuit, in this case, and the Third Circuit, in *Curran*.

The Third Circuit in *Curran* looked to *Ratzlaf v. United States*, 510 U.S. 135 (1994), for guidance in the proper construction of 18 U.S.C. § 2(b)'s "willfulness" required to support a charge of "causing false statements" in a campaign finance case. In such cases, the court of appeals recognized, defendants have no duty to disclose anything to

the FEC, the underlying conduct is not obviously "evil" or inherently "bad," and the conduct at issue was made illegal only by regulatory statute. *Curran*, 20 F.3d at 569. Thus, the court held, in this context, "willfully" requires the government to prove that the defendant knew of the political committee treasurer's reporting duty, attempted to frustrate that duty, and knew the acts were illegal. *Id.*

The D.C. Circuit explicitly rejected the interpretation of "willfulness" adopted by the district court below and the Third Circuit in *Curran*. Concluding that the Third Circuit went "too far," the court below chose what it viewed as "the natural reading of mens rea," that ignorance of the law is no excuse. App. 6a. The court held that in a causing false statements case based on contributions in the name of another made in violation of FECA, the government need only show "that the defendant knew that the statements to be made were false (the mens rea for the underlying offense -- §1001)" and "that the defendant intentionally caused such statements to be made by another (the additional mens rea for §2(b))." *Id.*

The decision of the D.C. Circuit is erroneous, conflicting not only with the Third Circuit but also with the standard of "willfulness" established by this Court in similar cases. Because willful is a "'word of many meanings,'" its construction often is influenced by its context. *Bryan v. United States*, 118 S. Ct. 1939, 1944 (1998). The Court has held that in the context of prosecutions that involve technical regulatory statutes that carry with them the risk that the innocent may be charged, the government must show that defendants knew their conduct was made illegal by the statutes in question. *See, e.g., Ratzlaf*, 510 U.S. 135 (currency reporting statute); *Cheek v. United States*, 498 U.S.

192 (1991) (criminal tax laws);[13] *see also Bryan*, 118 S. Ct. at 1946-47.[14]

Obviously, the proper context for interpreting the "willful" requirement when a "causing false statements" charge is founded on a FECA violation is FECA. The underlying political activity alleged here, activity fully regulated by the precisely drawn FECA, involves the solicitation of campaign contributions for candidates and political parties, an activity at the heart of important First Amendment protections. As the Department itself once confirmed, "[t]here is nothing inherently wrongful" or "socially deviant" about the conduct proscribed by FECA. 1980 Manual at 30. In fact, FECA proscribes activity "that would not strike an ordinary citizen as immoral or likely unlawful." *Aversa*, 984 F.2d at 502. In the case of

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[13] *See also Liparota v. United States*, 471 U.S. 419 (1985) (knowledge of food stamp regulations required); *Lambert v. California*, 355 U.S. 225 (1957) (felon's knowledge of duty to register required).

[14] In *Bryan*, the Court quoted with approval then-Judge Breyer's view of the basis of the "knowledge of the law" requirement in certain prosecutions:

> Both sets of laws [the tax and the currency structuring laws] are technical; and both sets of laws sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally.

Bryan, 118 S. Ct. at 1947 n.22 (quoting *United States v. Aversa*, 984 F.2d 493, 502 (1st Cir. 1993) (Breyer, C. J., concurring), *vacated sub nom., Donovan v. United States*, 510 U.S. 1069 (1994)).

"contributions in the name of another" this is particularly true: many such contributions are not proscribed by FECA,[15] and even those plainly subject to FECA's prohibition often involve innocent acts that would not inherently put one on notice of a possible criminal violation.

For example, a wife who wishes to contribute to a Republican candidate, but does not want her Democratic husband to know, "loans" a friend a $1,000 and asks the friend to write the check. Or, a busy individual who wishes to support a particular candidate but does not want his name published in the FEC rosters, for fear that droves of other candidates will henceforth harass him for money via phone, mail and fax, asks another to write the check.[16] Clearly, these acts, like all political activity regulated by FECA, are not "so obviously 'evil' or inherently 'bad,'" *Ratzlaf*, 510 U.S. at 146, particularly where, as here, the statute does not impose any disclosure obligation on solicitors or contributors, *see Republican Nat'l Comm. v. Federal Election Comm'n*, 76 F.3d 400, 406 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997),[17] that the willfulness element

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[15] For example, FECA does not prohibit "soft money" "contributions in the name of another," and FECA and its regulations specifically provide for several instances in which such contributions are legitimate. *See* 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.1(i)(2)(i) (1999).

[16] One need look no further than the indictment for examples of "innocent" contributions in the name of another. Here, many of the contributions were from monastics who do not, as a matter of religious doctrine, believe in the individual ownership of property. Thus, they were provided funds by the Temple following contributions and donations, just as they are recompensed for all personal expenses. App. 72a-77a.

[17] FECA placed responsibility on political committee treasurers to file lengthy and complex reports with the FEC. *See Buckley*, 424 U.S. at

Continued on following page

is satisfied regardless of a defendant's knowledge of the specific laws in question.[18]

Failing to adopt the Third Circuit's definition of willfulness, with its requirement of knowledge of illegality, risks unfairly ensnaring individuals in criminal liability for unknowing violations of technical regulatory provisions. To avoid precisely that result, Congress explicitly stated that it intended that *all* FECA violations, including contributions in the name of another, be criminalized *only if* committed with "knowledge of all the relevant facts and a recognition that

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62-63. Because of the "difficulties inherent in filing absolutely accurate reports of expenditures and contributions," Congress "contemplated" only that candidates and committees would make every effort to provide as precise an estimate as possible. S. Rep. No. 92-229, at 68 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1834. After *Buckley*, Congress determined that the treasurers need only meet a "best efforts" standard of conduct to be considered in compliance with the Act. This "anti-nit-picking" amendment was "crucial since contributor information is voluntarily supplied by persons who are not under the control of the committee." H.R. Rep. No. 96-422, at 14 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2874.

[18] Petitioner's case highlights the importance of a rigorous interpretation of willfulness. The district court concluded that it was:

> "difficult, if not impossible, . . . to imagine . . . that Ms. Hsia knew, at the time that she took whatever acts exposed her to Sections 1001 and 2(b) liability, that under the complex reporting scheme imposed on political committees, the listing of a name from a check might be deemed a 'false statement' and that her solicitations might 'cause' the political committees to make those false statements."

App. 111a n.32.

the action is prohibited by law." H.R. Rep. No. 94-917, at 4. The use of 18 U.S.C. §§ 2(b) and 1001 as a means of dispensing with FECA's First Amendment-sensitive intent requirement, something the court below accepted, flies in the face of the holdings in *Ratzlaf* and *Cheek*, is inconsistent with the Third Circuit in *Curran*, and should not be condoned by this Court.[19]

II. This Court Should Grant Certiorari To Resolve The Question Whether Congress Intended FECA To Be The Exclusive Means Of Enforcing FECA Compliance

This case also presents a threshold issue of critical importance that would resolve the split between the D.C. Circuit and the Third Circuit: whether FECA is the exclusive means of enforcing FECA compliance, thus prohibiting a prosecution of FECA violations under 18 U.S.C. §§ 2(b) and 1001 (regardless of the level of willfulness). This Court should grant certiorari because of the critical importance of this question to the administration

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[19] Even outside the FECA context, the court of appeals' decision could not stand. Recently, the Court held in *Bryan* that the terms "knowing" and "willful" are not synonymous, redundant words. "[U]nless the text of the statute dictates a different result," the Court said, "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan*, 118 S. Ct. at 1946. "Willfully" is a higher standard, requiring proof of a "culpable state of mind," "an evil-meaning mind." *Id.* at 1945-46. Thus, under *Bryan*, the court's view that Section 2(b)'s "willfulness" requirement, even coupled with Section 1001's "knowing and willful" requirement, meant only "knowing," reading out the willfulness requirement in both statutes, conflicts directly with *Bryan's* articulation of the minimum standard of proof required by the statutory term "willful."

of the only federal statute intended to regulate the First Amendment-sensitive area of campaign financing.

In analogous situations, the Court has not hesitated to conclude that, in light of congressional intent, broad, general criminal statutes do not apply to an area specifically and comprehensively regulated by a targeted statute. *See, e.g., Dowling v. United States,* 473 U.S. 207 (1985) (National Stolen Property Act did not apply to bootleg phonorecords regulated by the Copyright Act); *United States v. Enmons*, 410 U.S. 396 (1973) (Hobbs Act did not apply to the use of violence to achieve legitimate union objectives fully regulated by the labor laws); *see also United States v. Boffa,* 688 F.2d 919, 928-929 (3rd Cir. 1982) (rejecting mail fraud prosecution grounded on unfair labor practices where conduct was regulated exclusively under the National Labor Relations Act); *United States v. Delaurentis*, 491 F.2d 208, 214 (2d Cir. 1974) (rejecting application of the Civil Rights Act to conduct covered by the National Labor Relations Act).

Indeed, in considering the intersection of different statutory regimes, the Court has recognized repeatedly that an examination of congressional intent regarding the most recent relevant enactments defines the scope of an earlier enactment and the relationship between the two. *See e.g., NLRB v. Drivers Local Union*, 362 U.S. 274, 291-92 (1960) ("Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.");[20] *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175,

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20 In *Drivers Local Union*, the Court considered the sensitivity of the area of peaceful picketing, the Labor Board's own decade-old interpretation of the Act, and the goal of Congress to establish a coherent and comprehensive labor policy in the NLRA. 362 U.S. at 284, 291.

194 (1967); *see also Pipefitters Local Union v. United States,* 407 U.S. 385, 412 (1972) (Court considered 1971 FECA in construing 18 U.S.C. § 610, concluding that FECA helped "'throw a cross light' on the earlier enactment.") (citation omitted); *United States v. Johnson*, 390 U.S. 563, 564-66 (1968) (Court examined legislative history of Civil Rights Act of 1964 to determine whether prosecution to deprive individuals of rights guaranteed by that Act was permissible under federal conspiracy statute originally derived from the Enforcement Act of 1870.)

FECA and Congress' intent as expressed therein should determine whether 18 U.S.C. §§ 2(b) and 1001 may be used to enforce alleged violations of FECA's prohibition on contributions in the name of another. FECA is a comprehensive regulatory scheme that simplified and rationalized the enforcement of the federal election laws in light of First Amendment concerns. As then-Judge Ginsburg wrote in *Galliano v. United States Postal Service*, 836 F.2d 1362, 1370 (D.C. Cir. 1988), "[a] fine balance of interests was deliberately struck by Congress" in FECA's "first-amendment-sensitive . . . substantive" provisions and its "first-amendment-prompted arrangements . . . for FECA enforcement actions."[21]

With the First Amendment in mind, Congress fully considered the extent of regulation permissible for political committee disclosure reports and contributions, including contributions made in the name of another, and provided an intent-based, graded enforcement and penalty scheme which must be utilized for *all* FECA violations. Congress

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[21] In *Galliano*, the D.C. Circuit held that the general provisions of the postal false statements statute did not apply to FECA-regulated activities. *Galliano*, 836 F.2d 1362.

specifically rejected felony punishment for fundraising violations, never contemplating that contributors or solicitors would be subject to criminal liability by operation of the combination of two statutes that on their face did not apply and never before had been applied in the context of federal election fundraising. In fact, "contributions in the name of another" were not prosecuted as "causing false statements" for twelve years following FECA's post-*Buckley* amendments. "It is unlikely that if Congress" intended the causing false statement statutes to apply, "its action would have so long passed unobserved."[22] *Enmons*, 410 U.S. at 410.

FECA demonstrates a "good deal of care on Congress' part," which suggests the "indirect but blunderbuss solution" offered by this indictment should not supplant "a problem treated with precision [by Congress]." *Dowling*, 473 U.S. at 226. Indeed, it is "implausible to suppose Congress intended to combat" campaign finance violations "by the circuitous route hypothesized" by this case. *Id.* at 221. The "discrepancy between the two approaches" suggests that "Congress had no intention to reach" FECA violations through the causing false statements approach. *Id.* at 226. In FECA, "Congress intended to regulate all aspects of federal campaign finances," to fully occupy the field, for "the whole

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[22] Had Congress wished or intended to create a "false statement" when it proscribed "contributions in the name of another," it could have done so, utilizing language similar to that which it has used in many other misdemeanor false statement statutes. *See, e.g.*, *United States v. Hansen*, 772 F.2d 940, 945-47 (D.C. Cir. 1985). Indeed, Congress specifically addressed the extent to which 18 U.S.C. § 1001 was relevant to FECA, confirming that it applied when a false complaint alleging a violation of the Act was filed with the FEC. App. 120a.

of this Act is greater than the sum of its parts." *Buckley*, 424 U.S. at 235-36 (Burger, C.J., concurring in part and dissenting in part).

This Court has always recognized the "delicate and vulnerable" nature of the First Amendment freedoms, which are "supremely precious in our society." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Thus, where a statute reaches expression protected by the First Amendment, the Court "demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). The Court has subjected limitations on political contributions and expenditures, as well as campaign disclosure requirements, to strict scrutiny to ensure that the government's interest in regulating the activity outweighs the burden on the First Amendment. See *Buckley*, 424 U.S. at 45, 64-68. "The formula for strict scrutiny is . . . well established. It requires both a compelling governmental interest and legislative means narrowly tailored to serve that interest." *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 611 (1996) (Thomas, J., dissenting); *Buckley*, 424 U.S. at 25.

The broad "causing false statements" statutes at issue - and the effort to graft them onto a FECA-prohibited "contribution in the name of another"- cannot survive strict, or even close, scrutiny. There is no compelling governmental interest that would justify the statutes' use that has not already been addressed by the far less restrictive alternative enacted by Congress in FECA itself, a carefully crafted regime specifically designed for regulating the First Amendment sensitive area of campaign financing.

In an earlier FECA case, this Court observed that the government's "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes)

make it one." *Colorado Republican Federal Campaign Comm.*, 518 U.S. at 621. Here too, the Department cannot avoid the application of constitutionally mandated First Amendment protections, which require that the government regulate in this area via a narrowly drawn statute tailored to serve a compelling government interest, by the simple exigency of labeling the speech in question "false." "Mere labels" contain "no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Both as a matter of congressional intent and constitutional command, FECA's enforcement provisions are the exclusive means of enforcing FECA's requirements.

III. The Important Questions Raised By The Petition Are Frequently Recurring

The issues presented here will have continuing future consequences in every case involving "contributions in the name of another," whether brought by the FEC or by the Department. Only an opinion from this Court will bring about uniformity of decisions on these matters, providing certainty in a First Amendment-sensitive area, and laying to rest fundamental issues of constitutional law and statutory interpretation.

The issue of the level of intent that must be proved in a "causing false statements" prosecution based on FECA-regulated political activity has been clearly, fully, and specifically joined by the divergent views of the D.C. and the Third Circuit courts of appeals. That question, as well as the broader issue whether the "causing false statement" statutes may be used at all to regulate political activity already

subject to FECA, would not benefit from further study in the lower courts and can only be resolved by this Court.

While delay in addressing these issues would serve no purpose, it clearly would undermine and impair the rational, orderly administration of FECA, a particularly troubling result when First Amendment activity is subject to severe criminal sanctions. The very conduct alleged here, if prosecuted under FECA by the Department of Justice, would require a *higher* level of intent for a *misdemeanor* than the trial of the same FECA-prohibited conduct in the guise of a "causing false statement's" *felony* prosecution. Even a civil remedy pursued by the FEC, involving precisely the same conduct, would have a different, *higher*, intent standard than that approved by the D.C. Circuit below for this convoluted felony prosecution.[23] This gross disparity is contrary to Congress' expressed intent in FECA; it distorts FECA's carefully calibrated enforcement scheme by removing one activity, contributions "in the name of another," from FECA's finely tuned regime and using it as a vehicle for a "causing false statements" prosecution.

The "causing false statements" approach, if allowed to continue, will lead to other incongruous results. For example, Congress provided a jurisdictional monetary floor before the most severe punishment, the misdemeanor penalty, could be considered for a knowing and willful contribution in the name of another; yet the Department avoids that floor when it brings a "causing false statements" indictment. And, Congress provided a three-year statute of

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[23] Here, a finding of probable cause is pending at the FEC against Ms. Hsia. Oddly, and tellingly, that agency will have to prove a higher standard of intent for any civil remedies than the Department will have to prove here if this felony prosecution goes forward in the D.C. Circuit.

limitations for FECA violations; the Department avoids that limit when it brings a "causing false statements" case grounded on political "contributions in the name of another."

These are significant concerns, affecting many pending and future cases. Of the hundreds of alleged "contributions in the name of another" to political candidates reviewed over the last twenty years, the FEC has pursued the vast majority administratively, utilizing the higher standard of intent proscribed by Congress for the most serious violations. In contrast, since its formation in late 1996, the Campaign Financing Task Force has brought nineteen multi-count felony indictments, more than half of which involve allegations that the defendant "caused false statements" (or "conspired" to do so) by participating in "contributions in the name of another." Some of those cases are still pending, and the Task Force is actively proceeding with numerous other far-reaching investigations which, undoubtedly, will lead to further "causing false statement" prosecutions cobbled onto what is actually, at worst, a violation of FECA's prohibition of contributions in the name of another.

In addition to the direct harm suffered by those subjected to "causing false statements" prosecutions, society, which considers First Amendment freedoms among the "'most precious,'" *Buckley*, 424 U.S. at 41 (citation omitted), suffers as well, making it vital that the Court consider the issues presented in this petition. Where First Amendment concerns are implicated, as here, the Court has recognized that "'(p)recision of regulation'" is the "touchstone," *id.*; otherwise, vague or broad criminal laws may induce "citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citations omitted). Indeed, "[t]he loss of First Amendment

freedoms, for even minimal periods of time," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), whether by direct government action or through statutes which cause "citizens to 'steer far wider of the unlawful zone,'" *Grayned*, 408 U.S. at 109 (citation omitted), constitutes irreparable injury which is particularly acute in matters involving political speech and association, as "[t]he timeliness of political speech is" critical. *Elrod*, 427 U.S. at 374, n.29 (1976).[24] The effect of the court of appeals decision - criminal liability without knowledge of unlawfulness in a thicket of complex regulations - will be a powerful disincentive to active participation in political campaigns. An individual afraid to express political views or too fearful to support a particular candidate in a timely fashion may never have another opportunity to do so. To avoid this chill, it is vital that the Court promptly address the issues raised in this Petition.[25]

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[24] *See also Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329-30 (1975) (restriction on news media's pretrial coverage constitutes irreparable injury); *Carroll v. Princess Anne*, 393 U.S. 175, 182 (1968) ("'It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances.'") (citations omitted).

[25] The procedural posture of the case - in which the court of appeals reversed the district court's dismissal of counts in the indictment - does not counsel against review. This Court previously has granted certiorari in criminal cases in precisely this posture - where the court of appeals has reversed a district court's dismissal of an indictment and generated a split in the Circuits. *See, e.g., Bates v. United States*, 118 S. Ct. 285, 289 (1997). This Court likewise has granted certiorari in civil cases in which the court of appeals has reversed a district court's dismissal of a lawsuit. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Summit Health Ltd. v. Pinhas*, 500 U.S. 322 (1991).

In sum, the arguments for certiorari here are particularly compelling in light of the square split in the circuits; the importance of the issues; the chilling threat to core First Amendment values; and the disruption of Congress' carefully calibrated FECA regime. The issues are fundamental and recurring, and warrant this Court's review at this time.

CONCLUSION

For the foregoing reasons, Petitioner Maria Hsia respectfully requests that the Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

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October 20, 1999

United States Court of Appeals
The District of Columbia Circuit

Argued March 15, 1999.

Decided May 18, 1999.

UNITED STATES of America,
Appellant/ Cross - Appellee

v

Maria HSIA,
Appellee/ Cross Appellant

Nos. 98-3114, 98-3125.

Appeals from the United States District Court

for the District of Columbia
(No. 98cr00057-01)

Elizabeth D. Collery, Attorney, U.S. Department of Justice, argued the cause for appellant/cross-appellee. With her on the briefs was Eric L. Yaffe, Trial Attorney.

Nancy Luque and Rangeley Wallace argued the cause and filed the briefs for appellee/cross-appellant.

Reid H. Weingarten, William T. Hassler and Brian M. Heberlig were on the brief for amicus curiae Yah Lin Trie.

Before: WILLIAMS, ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

Concurring opinion filed by Circuit Judge ROGERS.

STEPHEN F. WILLIAMS, Circuit Judge: A six-count indictment charged Maria Hsia with various offenses deriving from a scheme to solicit illegal political contributions and disguise them as lawful ones. Hsia filed numerous motions to dismiss. The district court denied the motions as to Count One – conspiracy to defraud the Federal Election Commission ("FEC") and the Immigration and Naturalization Service ("INS") – but dismissed Counts Two through Six – causing false statements to be made to FEC. 24 F. Supp. 2d 33, 38-47, 52-63 (D.D.C. 1998); 24 F. Supp. 2d 63, 64-65 (D.D.C. 1998). The United States appeals this dismissal; we reverse. Hsia cross-appeals the refusal to dismiss Count One; we dismiss the appeal for lack of appellate jurisdiction.

* * *

The International Buddhist Progress Society ("IBPS"), one of Hsia's alleged co-conspirators and operator of the Hsi Lai Temple in Hacienda Heights, California, is a tax-exempt religious organization incorporated in California. The Federal Election Campaign Act ("FECA') forbids such a corporation from making contributions in federal election

campaigns, 2 U.S.C. § 441b(a); the tax code bars participation in political campaigns whether they are federal or not, 26 U.S.C. § 501(b)(3).

Hsia herself is an immigration consultant in the Los Angeles area. The indictment alleges a series of actions taken by her and her co-conspirators to funnel money from IBPS through straw contributors into various campaigns. Hsia would either find and solicit individuals to serve as nominal contributors, see Indictment ¶¶ 32, 35, 38, 40(hh), 40(ii), or ask IBPS to do so, see *id.* ¶¶ 17, 19, 23, 26, 28, 33, 35, 40(h), 40(k), 40(n), 40(q), 40(t), 40(z), 40(cc), 40(gg). (She sometimes employed herself as such a contributor. See *id.* ¶¶ 15, 30, 38, 40(jj).) When IBPS complied with such a request—often employing people associated with the Temple as nominal contributors, see *id.* ¶ 13(b)—Hsia sometimes forwarded the checks to the campaign. See *id.* ¶¶ 23, 33, 38, 40(kk). All nominal contributors, whether solicited by Hsia or by IBPS, were reimbursed in full by IBPS from its corporate funds. See *id.* ¶¶ 17, 19, 23, 24, 26, 28, 30, 32, 33, 35, 39, 40(g), 40(i), 40(*l*), 40(o), 40(r), 40(u), 40(x), 40(aa), 40(dd), 40(*ll*). The individuals thus simply served as conduits for IBPS's money.

Hsia also allegedly used conduits to funnel money from two of her immigration clients—Hsieh San Yeh and Zhe Xu[1]—to the Clinton/Gore '96 Primary Committee, Inc. ("Clinton/Gore '96"). In these instances she instructed others to solicit the straw donors but conveyed the checks to the committee herself. See Indictment ¶¶ 47-49; Bill of Particulars at 14-16.

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[1] Ms. Xu was apparently a foreign national barred from making contributions by 2 U.S.C. § 441e.

Count One charges that the actions involving IBPS constituted a conspiracy to defraud the United States, specifically the FEC and INS, in violation of 18 U.S.C. § 371. See Indictment ¶ 10. Counts Two through Six charge that Hsia, by means of her conduit contribution schemes, willfully caused certain recipients of such contributions—Clinton/Gore '96, the Democratic National Committee, and The Friends of Patrick J. Kennedy '96 - to make false statements to the FEC in violation of 18 U.S.C. §§ 2 and 1001: these recipients filed reports listing the conduit contributions as being from their nominal sources, although the true source was either IBPS, Mr. Yeh, or Ms. Xu. See Indictment ¶¶ 43, 46, 49, 52, 55; Bill of Particulars at 14-16.

* * *

Counts Two through Six are based on 18 U.S.C. §§ 2(b), 1001(a):

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2(b).

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> . . .
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title or imprisoned not more than 5 years, or both.

Id. § 1001 (a).[2]

The most orderly fashion for addressing the district court's decision is by the elements of willfulness, causation, and falseness, with respect to all of which it found deficiencies.

"Willfully"

According to the district court, the word "willfully" in § 2(b) requires the government to show that Hsia knew that her conduct was unlawful. 24 F. Supp. 2d at 62 n.32; 24 F. Supp. 2d 14, 21 (D.D.C. 1998) (original decision on this issue); see also *United States v. Trie,* 21 F. Supp. 2d 7, 14-16 (D.D.C. 1998).[3] Believing that the charges here required an unconventional and extreme interpretation of §§ 2(b) and 1001, the court found that Hsia could not have known that her conduct would fall within their grasp.

Although we find no material novelty in the government's reading of the statutes (see below), our

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[2] This is the current form of § 1001, which applies only to Count Six. Counts Two through Five, alleging acts occurring before this current language went into effect, charge violations of the previous version of §1001. That stated: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations . . . shall be fined under this title or imprisoned not more than five years, or both." The differences between the versions are not relevant to this case, and we will refer to the current § 1001.

[3] Although the district judge appeared to attribute this knowledge-of-criminality requirement to § 1001's "knowingly and willfully" language, it must, if it exists at all, be a gloss of "willfully" in § 2(b): no court adopting such a requirement has questioned the rule that knowledge of criminality need not be shown in direct § 1001 prosecutions. See *United States v. Curran,* 20 F.3d 560, 567-68 (3d Cir. 1994) (analyzing issue as § 2(b) requirement).

decision on whether the element of willfulness is adequately alleged does not turn on this point. We believe that the government need not prove that Hsia knew her acts to be unlawful; the question whether she could in fact have had such knowledge is therefore irrelevant.

The natural reading of §§ 2(b) and 1001 is this: the government may show mens rea simply by proof (1) that the defendant knew that the statements to be made were false (the mens rea for the underlying offense – § 1001) and (2) that the defendant intentionally caused such statements to be made by another (the additional mens rea for § 2(b)). See *United States v. Gabriel,* 125 F.3d 89, 101 (2d Cir. 1997). The district court, like the Third Circuit in *United States v. Curran,* 20 F.3d 560 (3d Cir. 1994), relied on *Ratzlaf v. United States,* 510 U.S. 135, 114 S.Ct.655, 126 L.Ed.2d 615 (1994), for its contrary result. But this extends *Ratzlaf* too far: that case did not universalize a broad reading of "willfully" and thus overturn the general rule that ignorance of the law is no excuse. *Ratzlaf* found a knowledge-of-criminality requirement in a statute that independently required the act at issue to be "for the purpose of evading" various reporting requirements; reading "willfully violating" there as only requiring intention would have made it surplusage. *Id.* at 139-41. In this case, no such problem exists. We find *Ratzlaf's* narrow exception inapplicable and adopt the natural reading of mens rea above. Accordingly, nothing in the indictment's allegations contradicts the government's capacity to prove the statutorily required mens rea.

"Causes"

It is not entirely clear what defects the district court found in the government's theory of causation. The initial objection—that "a check is not a statement," 24 F. Supp. 2d

at 62-63—appears not only incorrect (the cases indicate, at most, that a check does not assert that it will not bounce) but irrelevant. The false statements here are the political committees' reports identifying certain listed names as sources of specific contributions; the names on the checks, together with the rest of the alleged conduit contribution scheme, could have "caused" these false statements to be made whether or not the checks were themselves statements of anything. But the district court seems also to have had a more general objection—that the causal link between Hsia's conduct and the making of false statements was too "attenuated." *Id.* at 61-62.

Section 2(b) does not, of course, limit by its terms the particular means by which the defendant may "cause" another to commit the act, nor the degree of permissible "attenuation" between these two people's actions. Cf., e.g., *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 307 (3d Cir. 1997) (defendant may be prosecuted under §§ 2(b) and 1001 even if people who actually made false statements are not criminally liable). The mens rea element of the statute provides an outer limit on the latter, for a weak or implausible causal link would make it more difficult to prove that the defendant brought the effect about "willfully."

Nor is the general scheme of the indictment novel; the application of § 2(b) to a conduit contribution scheme has been several times upheld. See *Curran*, 20 F.3d 560; *United States v. Hopkins*, 916 F.2d 207 (5th Cir. *1990); Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990); cf. *United States v. Yermian*, 468 U.S. 63, 68-75 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984) (§ 1001 conviction requires no proof that defendant was aware of any federal agency jurisdiction). In those cases, defendants were convicted under §§ 2(b) and 1001 for employing such a scheme to conceal their own contributions: they had found nominal donors, had these

conduits make payments to a committee, and reimbursed them. Here, the money was not Hsia's; it belonged instead to her immigration clients or to her co-conspirator IBPS. But Hsia arranged—directly or indirectly—for the conduits to do their part. That she did this to channel *others'* money does not help her. As FEC regulations direct committees to report "any contribution made by check, money order, or other written instrument" "as a contribution by the last person signing the instrument" "[a]bsent evidence to the contrary," 11 CFR § 104.8(c), the simple interposition of conduits to sign the checks is certainly enough to "cause" a committee to make false statements in its report. The indictment and bill of particulars straightforwardly lay out the government's account of Hsia's affirmative steps toward that result.

Invocation of the due process clause or the First Amendment does not change the analysis, at least for review of the indictment. As the case fits comfortably within the clear and previously accepted scope of §§ 2(b) and 1001, there is no question of notice or vagueness. As for overbreadth, we do not understand how it might apply here. There is no suggestion that the statutes are facially invalid. While the absence of any claim that Hsia's activity was itself constitutionally protected is consonant with the general form of overbreadth standing, see *Board of Trustees v. Fox*, 492 U.S. 469, 484, 1109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), neither Hsia nor the district court ever specified just what protected activity could be chilled by the application of §§ 2(b) and 1001 to this case. "Overbreadth" appears, at bottom, to have been another tag for the court's concern that the indictment stretched §§ 2(b) and 1001 unreasonably far. We see no constitutional difficulty in use of the statutes against the conduct alleged here.

"False"

The final strand of the district court's reasoning was its suggestion that the statements at issue were "literally true." 24 F. Supp. 2d 33, 58.

FECA requires that political committees file periodic reports containing, among other things, the identification of each –

> (A) person . . . who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year . . . together with the date and amount of any such contribution.

2 U.S.C. § 434(b)(3). "Contribution" is defined, in relevant part, as

> any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.

Id. § 431(8)(A)(i). FECA also provides that

> For purposes of the limitations [on contributions and expenditures] imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

Id. § 441a(a)(8). Finally, FECA specifically states:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

Id. § 441f.

We are convinced by these latter provisions that § 434(b)(3)'s demand for identification of the "person . . . who makes a contribution" is *not* a demand for a report on the person in whose name money is given; it refers to the true source of the money. As the committees here did not report the true sources, their statements would appear to be false.

The district court, for the most part, appears to have agreed with this analysis. See 24 F. Supp. 2d at 59-60. It determined, however, that FECA's safe harbor provision, 2 U.S.C. § 432(i), controlled the case. That subsection, added five years after FECA's original enactment, states:

> When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act.

Id. Because the indictment does not allege that the committee treasurers had any wrongful knowledge, the district court found, the statements in the reports must be considered FECA-compliant (and therefore not false). 24 F. Supp. 2d at 60-61.

The argument assumes that this safe harbor does not merely provide an affirmative defense for the committee and its officers but actually modifies the substantive reporting requirements of FECA. Even if the provision wrought some substantive amendment, however, it could not be so drastic as to aid Hsia here. Section 432(i) conditions its relief on the treasurer's making "best efforts" to ascertain the necessary information, and FEC has spelled such efforts out in 11 CFR § 104.7. But not even Hsia argues that the section would shield a treasurer who went through the motions of the "best efforts" and then submitted information contrary to facts known to her. Thus, if the act of filing the report with conduits listed as contributors were "directly performed by" Hsia, 18 U.S.C. § 2(b), her actual knowledge of falsity—required to be shown anyway—would make the statements culpable regardless of any ritualistic performance of "best efforts."

In any event, we find no substantive modification. The statute allows the safe harbor only when the treasurer "shows" the use of best efforts, suggesting that the provision only applies to a proceeding against the committee itself or one in a position to make such efforts on the committee's behalf. 2 U.S.C. § 432(i). Further, there remains no qualifying language in the actual reporting requirements, and indeed § 432(i) refers to "the information required by this Act." *Id.* Finally, it would make no sense for Congress to allow treasurers to rely on the provision of information by others while at the same time giving others a virtual carte blanche to provide inaccurate information. We believe § 432(i) does not benefit those not associated with the committee at issue.

On appeal, amicus Yah Lin ("Charlie") Trie presents an alternate theory of truth. Trie relies on the FEC forms themselves, claiming that they did not request identification

of the actual source of the money. This argument might make some sense if the forms employed terms other than those of the statute itself, but they do not. Schedule A—the list of names at issue—is simply an itemized list of "Contributions (other than loans) From [ ] Individuals/Persons Other Than Political Committees." This, like the rest of the form, simply echoes and implements the language of § 434(b)—a subsection which, as we have noted above, requires that the true source of money be reported.

We thus reject all arguments that the statements alleged in the indictment were "literally true."[4]

* * *

Although Hsia conclusorily restates the theories adopted by the district court, most of her briefs are devoted to alternate theories for affirming the dismissal.

Hsia's initial claims are all of First Amendment protection. Her free exercise arguments (asserted on behalf of IBPS and its members) we can dismiss immediately: these are—at most—a basis for a defense at trial, not a legal deficiency in the indictment. Her free speech argument appears to be this: since Hsia was simply soliciting political contributions, her actions here were protected speech; therefore the indictment must be subject to strict scrutiny.

This misframes the issue. The only solicitations alleged are those of *conduit* contributions and of nominal "contributions" from the conduits themselves. Neither is protected. FECA's reporting requirements were upheld by the Supreme Court. See *Buckley v. Valeo,* 424 U.S. 1, 60-68,

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[4] We also reject Trie's contention, based on his same theory, that the counts must be dismissed because the FEC forms were "fundamentally ambiguous." Read in context, the forms have no such defect.

96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Hsia has not suggested any plausible grounds for a right to tamper with these reports. Cf., e.g., *Goland,* 903 F.2d at 1258 (rejecting as frivolous defendant's asserted right to contribute anonymously via conduits).

Finally, turning to Hsia's argument that FECA constitutes a pro tanto repeal of §§ 2 and 1001, we agree with the district court that it does not.

We work in these cases under a presumption against repeal by implication. In *United States v. Hansen,* 772 F.2d 940 (D.C. Cir. 1985), rejecting an argument that the financial disclosure requirements of the Ethics in Government Act effected a pro tanto repeal of § 1001, we said that the presumption rests on the view "that Congress legislate[s] with knowledge of former related statutes, . . . and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction." *Id.* at 944–45 (internal quotation omitted). Thus we will not find repeal absent "clear and manifest" evidence that it was intended. *Id.* at 947–48.

Hsia presents no evidence of this sort. Instead, she relies on our decision in *Galliano v. United States Postal Service,* 836 F.2d 1362 (D.C. Cir. 1988). There the Postal Service, exercising its administrative power under the general postal fraud provisions of 39 U.S.C. § 3005, had attacked as misleading the name and disclaimers on a solicitation for political contributions. To the extent FECA set out standards for these elements of such a solicitation, we held, it displaced the Service's authority under § 3005.

Hsia reads the case broadly, as indicating that FECA generally displaces more general statutes. Like the district

court, we disagree. *Galliano* concerned the relative scope of jurisdiction for two administrative agencies—FEC and the Postal Service. The Department of Justice's authority to enforce general criminal statutes is quite different.[5]

> Unlike the Postal Service, the Department of Justice has no authority to develop substantive standards of its own. As a criminal enforcer, it brings cases in federal court, where judges interpret the underlying statutes without deference to the Department. See *Crandon v. United States,* 494 U.S. 152, 177-78, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring). There is, therefore, no risk that Congress might have empowered two bodies to promulgate conflicting substantive standards—a result that *Galliano* presumed Congress would seek to avoid. We thus rely on our general requirement of clear evidence and find no repeal.

* * *

On both statutory and First Amendment grounds, Hsia cross-appeals the district court's refusal to dismiss Count One (conspiracy). On its face, of course, this refusal is plainly not a "final decision" over which 28 U.S.C. § 1291 gives us jurisdiction. Hsia nevertheless suggests two grounds for appellate jurisdiction: the collateral order doctrine and pendent appellate jurisdiction. We reject both.

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[5] *Galliano* did not purport to disturb the long-recognized rule that the power of the Department to prosecute criminal violations is not displaced merely by the fact of a more focused later enactment, see *Hansen,* 772 F.2d at 945-46 (citing cases)—a corollary to the rule that where various criminal prohibitions intersect, a prosecutor may choose among them, see *United States v. Batchelder,* 442 U.S. 114,123-24, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

To qualify as a final collateral order appealable under § 1291, the order at issue must, among other things, "be effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)—that is, it must involve "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald,* 435 U.S. 850, 860, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978). Hsia's asserted rights—principally free speech and free exercise—do not so qualify. Unlike congressional Speech or Debate immunity, see *Helstoski v. Meanor,* 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979), for example, they are not rights to avoid trial altogether. But see *United States v. P.H.E., Inc.,* 965 F.2d 848, 855 (10th Cir. 1992) (finding that "unique confluence of factors" made First Amendment-based collateral appeal permissible). We apply the collateral order doctrine "with the utmost strictness in criminal cases," *Flanagan v. United States,* 465 U.S. 259, 265, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984); any rule allowing immediate appeals for defendants advancing some First Amendment reason why an indictment should be dismissed would expose a vast array of criminal trials to interruption.

Hsia alternatively asserts pendent jurisdiction. But in dictum in *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), the Supreme Court appeared to rule out such a theory:

> In determining that the courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds, we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well. . . . [S]uch claims are appealable if, and only if, they too fall within *Cohen's*

> collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

Id. at 662-63. Though the statement is only dictum, we think it right to take it literally, at least as to defendants' attempted appeals. Cf. *United States v. Zafiro*, 945 F.2d 881, 885 (7th Cir. 1991) (suggesting that pendent appellate jurisdiction may allow government to challenge, at time of an interlocutory appeal authorized by § 3731, grant of severance to multiple defendants). An even partly open door could enable defendants to achieve untoward delay by coupling extra claims with a weak interlocutory appeal, and thus would give them an incentive to raise weak claims before the trial court on issues allowing interlocutory appeals; even where the interlocutory appeal is brought by the government, as here, we see no reason to give the defendant a windfall opportunity to delay proceedings via cross-appeal.

* * *

We reverse the district court's dismissal of Counts Two through Six, dismiss Hsia's cross-appeal for lack of jurisdiction, and remand the case for proceedings consistent with this opinion.

So ordered.

ROGERS, *Circuit Judge*, concurring:

I join the court in reversing dismissal of counts two through six, and remanding the case for trial. Our remand order means that any appellate disposition of count one could

not resolve the entire case on appeal. Absent such an efficiency ground for review, or any other compelling reason to act now rather than after trial, there is no basis for exercising pendent appellate jurisdiction over Hsia's challenges to count one. The court therefore need not decide whether and under what conditions a court may exercise pendent jurisdiction over interlocutory appeals in criminal cases that may arise in the future. Consequently, the court's dictum purporting to bar such jurisdiction over claims raised by defendants is unnecessarily broad.

Hsia's pendent appellate jurisdiction claim would fail even under the standards applicable to civil cases. Addressing her challenges to count one now would not dispose of the case, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1026-27 (D.C. Cir. 1997), and there is nothing in the record to suggest that her cross-appeal is one of those "rare exceptions" where "substantial considerations of fairness or efficiency" justify exercising pendent jurisdiction. *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678-79 (D.C. Cir. 1996). Our remand of counts two through six demonstrates, moreover, that the issues on cross-appeal are not so "inextricably intertwined" with those of the jurisdictionally proper appeal that "review of the former . . . [is] necessary to ensure meaningful review of the latter." *Swint v. Chambers County Com'n,* 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). In short, Hsia has not advanced a compelling reason to review count one before trial.

Hence, the court has no occasion to decide whether exercising pendent appellate jurisdiction over a criminal defendant's claim may in some circumstances be appropriate. Contrary to the court's suggestion, the Supreme Court has not foreclosed such jurisdiction. The court relies on dictum from *Abney v. United States,* 431 U.S. 651, 662-63, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), that it reads to hold by negative

implication that pendent appellate jurisdiction is not available over claims by defendants in criminal cases. *See* opinion at 13. The Supreme Court's subsequent decision in *Swint* suggests a less rigid civil-criminal distinction than this court attempts to extract from *Abney*. First, the *Swint* Court did not characterize *Abney* as completely barring pendent appellate review in criminal cases, but rather as rejecting a rule "loosely allowing" such review. *See Swint*, 514 U.S. at 49-50. Second, in *Swint*, a civil case, the Court noted that *Abney's* reasoning applied in both civil and criminal contexts, but went on to permit at least some pendent jurisdiction in civil appeals. *See id.* This extension of *Abney* to the civil context does not automatically mean that *Swint* likewise extends to the criminal context, but suggests that the *Abney* dictum may not be a sturdy foundation upon which to base a categorical limit to this court's appellate jurisdiction.

All of the reasons offered by the court to deny pendent jurisdiction in criminal appeals would also justify withholding such review over claims raised by defendants in civil appeals, *see* opinion at 13-14, and yet review is available in civil cases if certain strict standards are satisfied. *See, e.g., Swint*, 514 U.S. at 46-50; *Clinton v. Jones*, 520 U.S. 681, 707 n.41, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); *Gilda Marx*, 85 F.3d at 678. While these standards may apply more stringently in criminal cases, *cf. United States v. Rostenkowski*, 59 F.3d 1291, 1301 (D.C. Cir. 1995), it is not clear that criminal appeals are so fundamentally different from civil appeals that a safety-valve to the finality requirement applies in one but never in the other, nor that the asymmetric scheme posited by the court, categorically foreclosing review only of defendants' claims, even when the government has also filed an interlocutory appeal, *see* opinion at 526, necessarily follows.

Accordingly, I would dismiss Hsia's cross-appeal on the relatively narrow grounds discussed above, and leave broader questions for a case that actually raises them.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 98-0057 (PLF)
MARIA HSIA,	)	
Defendant.	)	

OPINION

This case is before the Court on fourteen pre-trial motions filed by defendant Maria Hsia.[1] The Court heard argument on the motions on July 27 and 28, 1998.

The Court will issue separate opinions addressing defendant's Motion 1 (to Dismiss the Indictment for Violation of Due Process); Motion 2 (to Dismiss Counts in the Indictment for Their Positive Repugnance to the Federal Election Campaign Act); Motion 3 (to Dismiss Count 1 of the Indictment for Failure to State an Offense under 18 U.S.C. § 371); Motion 5 (to Dismiss Counts 2 through 6 for Failure to State an Offense Under 18 U.S.C. §§ 2(b) and 1001 (Causation)); Motion 6 (to Dismiss Counts 2 through 6 for Failure to State an Offense Under 18 U.S.C. §§ 2(b) and 1001 (False Statements)); Motion 7 (to Dismiss Counts 4 and 5 for

[1] Ms. Hsia filed fifteen numbered motions, but Motion No. 12 simply requested an extension of time, and the Court has already granted that motion.

Failure to State an Offense Under 18 U. S. C. § § 2(b) and 1001 (Soft Money)); Motion 9 (to Dismiss Indictment Because It Offends the First Amendment); Motion 10 (to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia); and Motion 11 (to Dismiss Indictment Because It is Tainted).

For the reasons discussed below, the Court will deny Motion 4 (to Dismiss Count 1 (FEC) and Counts 2-6 for Failure to State an Offense under 18 U.S.C. §§ 371 and 1001 (Intent)) and Motion 13 (to Dismiss Count 1 for Lack of Venue). The Court will grant in part and deny in part Motion 8 (to Strike Surplusage); Motion 14 (to Compel Discovery and Disclosure of Exculpatory Information); and Motion 15 (for a Bill of Particulars).

I. BACKGROUND

A. Federal Election Campaign Act

The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 et seq., provides a detailed set of limits governing contributions to electoral campaigns and expenditures by candidates. Of specific relevance to this case, FECA provides that "[n]o person shall make contributions" that exceed certain limits set forth in the statute. 2 U.S.C. § 441a. The statute also prohibits any person from making contributions in the name of another or knowingly permitting her name to be used to effect such a contribution, 2 U.S.C. § 441f, and prohibits corporations from making contributions in connection with "any election at which presidential or vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices," 2 U.S.C. §

441b(a). The statute charges the Federal Election Commission ("FEC") with the administration and enforcement of FECA. 2 U.S.C. § 437c. It provides for both civil and criminal enforcement, and specifies criminal penalties for certain violations, up to a maximum of one year imprisonment and/or a fine. 2 U.S.C. § 437g(d).

A "contribution" is defined by statute, in relevant part, as "money or anything of value made by any person for the purpose of influencing any election for *Federal* office," see 2 U.S.C. § 431(8)(A) (emphasis added), and the contribution limits set forth in FECA undisputably apply to contributions made to candidates for federal office, otherwise known as "hard money" contributions. In this case, the government does not dispute that FECA does not generally cover contributions for state or local campaigns and non-campaign activities such as issue advocacy, otherwise known as "soft money" contributions.[2] National political parties that support both federal and state/local candidates have set up separate accounts: "hard money" accounts for contributions that are subject to FECA and that are used for candidates in federal elections and "soft money" accounts for funds to be used only for non-federal campaigns and for non-campaign activities.

FECA requires "political committees," including national political parties, to file reports with the FEC identifying each person who made "contribution[s]" in the aggregate annual amount of $200 or more. 2 U.S.C. § 434. FEC regulations go further, requiring national political party committees to report any receipt of funds over $200, regardless of whether the funds are deemed "hard money" or "soft money." 11 C.F.R. § 104.8(e) (requiring information,

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[2] "Contribution" is separately and more broadly defined for purposes of 2 U.S.C. § 441b. 2 U.S.C. § 441b((b)(2). The separate definition, however, is irrelevant to this case.

including name, address and occupation of all individuals or entities who "donate" an aggregate amount in excess of $200 in any calendar year to a national party committee's non-federal account(s)).

B. The Indictment

Count 1 of the indictment charges that Ms. Hsia conspired with the International Buddhist Progress Society ("IBPS"), a tax-exempt religious organization doing business as the Hsi Lai Temple (the "Temple"), and other unnamed co-conspirators to defraud the United States by impairing, obstructing, impeding and defeating the lawful functions and duties of the FEC and the Immigration and Naturalization Service ("INS") in violation of 18 U.S.C. § 371.[3] The indictment alleges that Ms. Hsia solicited IBPS to make contributions through "straw" donors or "conduits" (some of whom were monks, nuns and volunteers from IBPS) and made campaign contributions in her own name knowing that the IBPS would reimburse her. The indictment alleges that Ms. Hsia (1) impaired and impeded the FEC by concealing the fact that IBPS was the true source of the contributions, and (2) impaired and impeded the INS by submitting documents to the INS stating that IBPS was not participating in political campaigns so that the INS would permit foreign nuns and monks associated with IBPS to enter or remain in the United States when she knew that IBPS in fact was making political contributions.

Counts 2-6 charge Ms. Hsia with causing the making of false statements to the FEC in violation of 18 U.S.C. §§ 2 and 1001. The indictment alleges that Ms. Hsia knowingly and willfully caused various political committees to submit material false statements to the FEC by concealing the identity

[3] IBPS has not been indicted for its alleged role in the conspiracy.

of the true source of contributions from the committees which then relayed the false information to the FEC. Each count addresses a different report submitted to the FEC by a political committee which allegedly contained false statement(s) about the identity of actual contributors. Count 2 pertains to a July 18, 1995 report and Count 3 to an October 17, 1995 report by the Clinton-Gore '96 Committee; Count 4 relates to an April 15, 1996 report and Count 5 to a July 15, 1996 report by the Democratic National Committee; and Count 6 pertains to an October 24, 1996 report by the Patrick Kennedy Committee. Counts 2 and 3 do not identify the actual source of the contributions, but Counts 4-6 allege that IBPS was the actual contributor. Counts 2-6 all allege that Ms. Hsia solicited the contributions at issue, but only Count 6 alleges that Ms. Hsia herself wrote a contribution check for which she was reimbursed by IBPS.

II. MOTIONS TO DISMISS

A. Defendant's Motion 4, to Dismiss Count 1 (FEC) and Counts 2-6 for Failure to State an Offense under 18 U.S.C. § § 371 and 1001

Ms. Hsia contends that Counts 2-6 (false statements) and the portion of Count 1 that is based on alleged false statements to the FEC must be dismissed because the indictment fails to allege that Ms. Hsia knew that the political committees were required to report to the FEC. This Court previously has held that "when a contributor is charged as an aider and abettor in the federal election context for causing an intermediary to make a false statement to the FEC, the prosecution must prove that 'defendant knew of the [political party] treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful.' " See United States v. Trie, Criminal No. 98-0029, 1998 WL 427550, at *4 (D.D.C. July 17, 1998) *(quoting*

United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994)). The Court in Trie explained that the government is required to prove this knowledge because "a showing of 'willfulness' requires" such proof in the federal election context where the government relies on a combination of Section 2(b) and Section 1001. United States v. Trie, 1998 WL 427550, at *6. The Court in Trie also found that the indictment sufficiently alleged the essential element of willfulness by alleging that Mr. Trie acted "knowingly and willfully" and therefore "[w]hether Mr. Trie knew of the reporting requirement of the DNC is a matter for proof at trial and the crafting of proper jury instructions." Id. at 11.

Each of the false statements counts of Ms. Hsia's indictment alleges that Ms. Hsia "knowingly and willfully caused the submission of a material false statement to the FEC." Relying on cases in which courts have created intent elements where the statutes at issue did not specify intent, Ms. Hsia maintains that the Court in Trie created a new element of intent and that the indictment therefore is defective because it does not specifically allege that Ms. Hsia knew of the political committees' reporting obligations. See United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979) ("Although an indictment tracking the language of a statute is usually adequate because statutes usually include all elements of a crime, an indictment is inadequate when it fails to allege an essential element of the offense even when it tracks the language of the statute"). Ms. Hsia has read more into the Trie opinion than exists.

Ms. Hsia is correct that the willfulness standard articulated by the Court in Trie applies to Ms. Hsia as the solicitor of the alleged conduit contributors just as it applied to Mr. Trie as the alleged conduit contributor. The willfulness standard articulated in Trie, however, is just that: a definition of willfulness that the government must prove at trial. The

Court did not create a new element or add an intent element where none had previously existed. Instead, it merely provided a definition for the existing willful intent element of a Section 1001 and 2(b) prosecution in the federal election context. As in Trie, the Court finds that the indictment sufficiently alleges the essential "willfulness" requirement in that it alleges that Ms. Hsia acted "knowingly and willfully." Ms. Hsia's motion therefore will be denied .[4]

B. Defendant's Motion 13, to Dismiss Count 1 for Lack of Venue

Ms. Hsia has been charged with conspiracy to defraud the United States by impairing and impeding the lawful functions of the Federal Election Commission and the Immigration and Naturalization Service in violation of 18 U.S.C. § 371. She has moved to dismiss the conspiracy count for lack of venue. Because conspiracy is considered a continuing offense, see United States v. Tannenbaum , 934

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[4] The dissenting judge in Keith, in a statement with which the majority did not disagree, had it right:

> A distinction must be made between two different situations: (1) Where judicial or decisional gloss adds new elements to a crime; (2) Where the gloss does no more than define the meaning of an element set forth in the statute. In the former case the newly added elements must be included in an indictment. In the latter case no new element has been added. The element set forth in the statute which has been judicially defined takes on the meaning given to it by the judicial definition. In this sense the statutory language has become a term of art. When it is used in an indictment it carries with it the judicial definition.

United States v. Keith, 605 F.2d at 465 (Merrill, J., dissenting) (footnote omitted).

F.2d 8, 12 (2d. Cir. 1991); United States v. Cordero, 668 F. 2d 32, 43 n. 17 (1st Cir. 1981), venue for this charge is governed by 18 U.S.C. § 3237. In relevant part, Section 3237 provides that "any offense against the United States begun in one district . . . may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). This language has been interpreted to limit venue to " 'any district in which some overt act in furtherance of the conspiracy was committed by any of the co-conspirators.' " United States v. Lam Kwong-Wah, 924 F.2d 298, 301 (D.C. Cir. 1991) *(quoting* United States v. Rosenberg, 888 F.2d 1406, 1415 (D.C. Cir. 1989)), *cert. denied,* 605 U.S. 901 (1992); see Hyde v. United States , 225 U.S. 347 (1912).

As a preliminary matter, Ms. Hsia contends that the government must allege venue separately for each of the two objects of the conspiracy - the FEC and the INS. Because the government has alleged no overt acts in the District of Columbia that were taken in furtherance of the INS object of the alleged conspiracy, Ms. Hsia argues that there is no basis for venue here for the INS as an object of the conspiracy. She cites no cases in support of this proposition. The government responds that dividing a single conspiracy charge into its two objects is inappropriate for purposes of establishing venue. It claims that it must prove at trial only that at least one act was committed in furtherance of *the conspiracy* - not one act in furtherance of *each object* of the conspiracy. It therefore follows, according to the government, that to establish venue it must allege only one overt act in furtherance of the conspiracy as a whole that occurred in the District of Columbia.[5] The Court agrees. The essence of the crime of

[5] The three elements of conspiracy the government must prove at trial are: (1) that the defendant agreed with at least one other person to defraud the United States; (2) that the defendant knowingly participated in the conspiracy with the intent to defraud the United States; and (3) that at least

conspiracy is the agreement. See Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Young, 503 F.2d 1072, 1076 (3rd Cir. 1974). In this case, the indictment alleges that there was one agreement: to defraud the United States by impairing and impeding the FEC and the INS. Venue for Count 1 therefore is proper in the District of Columbia as long as at least one overt act in furtherance of the agreement was committed in this district.

The government maintains that the indictment alleges eight overt acts committed in the District of Columbia in furtherance of the conspiracy. Seven involve false statements that Ms. Hsia allegedly caused the campaign committees to submit to the FEC, which is located in the District of Columbia. The remaining overt act involves a March 1996 visit by Ms. Hsia and representatives of the Temple to the White House, when they allegedly invited Vice President Gore to visit the Temple in California. See Indictment at ¶¶ 40(j), (m), (s), (v), (bb), (pp) & (y). Ms. Hsia contends that the seven false statements cannot be used as a basis for finding venue for the conspiracy count because neither the FEC nor the campaign committees – the only entities acting in the District with regard to the false statements – are alleged co-conspirators. She also argues that her visit to the White House was not an overt act in furtherance of the conspiracy. Ms. Hsia therefore seeks dismissal of the conspiracy count for lack of venue.

1. False Statements as Bases for Venue

Ms. Hsia concedes that venue for the false statement charges (Counts 2-6) is proper in the District of Columbia

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one overt act was committed in furtherance of the conspiracy. See United States v. Dean, 55 F.3d 640, 647 (D.C. Cir. 1995), *cert. denied,* 516 U.S. 1184 (1996).

because venue in false statements cases is appropriate in any district to which the false statement ultimately is forwarded, even, if by a person other than the defendant. See United States v. Bilzerian, 926 F.2d 1285, 1301 (2d Cir.), *cert. denied,* 502 U.S. 813 (1991); United States v. Candella, 487 F.2d 1223, 1228 (2d Cir. 1973), *cert. denied,* 415 U.S. 977 (1974); United States v. Crop Growers Corp., 954 F.Supp. 335, 353 (D.D.C. 1997). Ms. Hsia argues, however, that the seven overt acts involving false statements cannot be used as the basis for venue for the conspiracy count because venue for conspiracy is appropriate only where one of the co-conspirators actually committed an overt act. She maintains that venue for conspiracy does not lie in this district because neither Ms. Hsia nor her alleged co-conspirators *acted* in the District of Columbia to cause the committee treasurers to submit false statements.

Ms. Hsia's reading of the venue requirements for conspiracy is too narrow. Conspiracy is a continuing offense, and venue for continuing offenses is proper in any district in which the crime was begun, continued or completed. 18 U.S.C. § 3237(a). Because the submissions of the false statements to the FEC in the District of Columbia were foreseeable effects of Ms. Hsia's alleged overt acts in California, and because the submissions were necessary to the success of the alleged conspiracy to defraud the United States, venue is proper in the district in which the false statements were submitted. In United States v. Tannenbaum, checks were written in Manhattan but debited from an account in Brooklyn. The Second Circuit nevertheless found that venue was proper in the U.S. District Court for the Eastern District of New York in Brooklyn. "Although the checks were written in Manhattan, the actual debiting of the account - which was not only foreseeable but, indeed, necessary to the success of the scheme - occurred at [defendant's] bank in Brooklyn," and this was sufficient to establish venue for a conspiracy charge

in that district. 934 F.2d at 12-13. While neither Ms. Hsia nor any of her co-conspirators did any act in the District of Columbia, she allegedly caused the overt act of submission of false statements to occur in the District of Columbia. The Court can see no difference between causing a check to be debited from a bank account and causing the campaign committee treasurers to submit false reports to the FEC. The overt acts involving false statements therefore are sufficient to establish venue in the District of Columbia.[6]

2. White House Visit as Overt Act

The government also has alleged as an overt act that in March 1996, Ms. Hsia and representatives from the Temple met with Vice President Gore at the White House. While there, they allegedly invited the Vice President to visit California and the Temple. Ms. Hsia argues that the White House visit cannot possibly be considered an overt act in furtherance of the conspiracy because it is not reasonable to

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[6] While Ms. Hsia relied heavily at oral argument on United States v. Angotti, 105 F.3d 539 (9th Cir. 1997), and United States v. Manges, 110 F.3d 1162 (5th Cir. 1997), *cert. denied,* 118 S.Ct. 1675 (1998), these cases do not support Ms. Hsia's position. In Manges, the court found that an act by a person who was not a co-conspirator was irrelevant for purposes of *statute of limitations* analysis because consideration of that act would inaccurately imply "that the conspiracy was still a going concern." Id. at 1170. The statute of limitations considerations discussed by the court in Manges are irrelevant to the venue analysis here. See United States v. Tannenbaum , 934 F.2d at 13 ("Rules governing venue and [statutes of] limitations serve distinct purposes").

In Angotti, the court found that there was venue for a conspiracy charge in the district where a false verification of deposit was submitted. United States v. Angotti, 105 F.3d at 545. The court did not imply, however, that this was the only district in which venue would lie, nor did it state that venue would not lie in the district where the false report was received.

infer from the allegations that the White House meeting advanced the conspiracy's goal of hiding the source of campaign contributions. While the connection between the alleged conspiracy and the White House visit appears tenuous, the Court does not agree that the visit cannot be an overt act in furtherance of the conspiracy. An overt act is "a concrete step toward carrying out the agreement, not one that actually accomplishes the goal[s] of the conspiracy." United States v. Sarault, 840 F.2d 1479, 1487 (9th Cir. 1988). Here, the visit to the White House might be considered a "concrete step" toward carrying out the agreement and an act in furtherance of the conspiracy to conceal the Temple's political contributions.

The government maintains that the visit to the White House is an overt act in furtherance of the conspiracy because the invitation to the Vice President ultimately resulted in his attendance at the April 29, 1996 event at the Temple, for which the government alleges Ms. Hsia solicited and the Temple contributed unlawful conduit and corporate contributions. In light of this alleged connection, the Court concludes that the visit to the White House could be found to constitute an overt act in furtherance of the alleged conspiracy. Whether the White House incident was actually an act taken in furtherance of the conspiracy is a factual question for the jury to decide. The indictment adequately alleges that Ms. Hsia's visit to the White House was an overt act in furtherance of the conspiracy, and venue therefore is proper in the District of Columbia.

III. MOTION TO STRIKE

Ms. Hsia claims in Motion 8 that a number of words and phrases in the indictment are irrelevant and prejudicial, and she therefore requests that the Court exercise its discretion under Rule 7(d) of the Federal Rules of Criminal Procedure to strike these items from the indictment as

surplusage. The words and phrases at issue are: (1) references to Ms. Hsia as "a/k/a Hsia Ling" in the caption and in paragraph 1 of the indictment; (2) references in Count 1 to contributions to candidates for state and local elections; (3) references in Count 1 to contributions to the DNC which Ms. Hsia characterizes as "soft money" contributions; (4) references in Count 1 to alleged acts of concealment or "cover-ups" as part of the alleged conspiracy; (5) references in Count 1 to President Clinton and Vice President Gore; (6) certain assertedly inflammatory words and phrases in Count 1, such as "unlawful," "secret, disguised and illegal," "illegal," "straw donors," "conduit," "long-standing pattern," "covered-up," and "falsely;" and (7) the words "among others" and "and elsewhere" in paragraph 40.

In exercising the Court's authority to strike surplusage, "[m]aterial that can fairly be described as 'surplus' may only be stricken if it is *irrelevant and prejudicial.*" United States v. Oakar, 111 F.3d 146, 157 (D.C. Cir. 1997) (emphasis added). See also United States v. Watt, 911 F. Supp. 538, 554 (D.D.C. 1995). Since it is the practice of this Court to provide a copy of the indictment to the jury, inflammatory statements in the indictment that are not essential to allegations respecting the crimes charged may prejudice the defendant and should be stricken. *Relevant* language, however, "should not be stricken even if it may be prejudicial." See United States v. Weinberger, Crim. No. 92-235, 1992 WL 294877, at *7 (D.D.C. Sept. 29, 1992). Upon review of the words and phrases at issue, the Court concludes that some of the challenged items are both irrelevant and prejudicial and will be stricken; some do not meet the standard for striking surplusage and will be retained; and some cannot be resolved until the Court addresses Motions 3 (to Dismiss Count 1 of the Indictment for Failure to State an Offense under 18 U.S.C. § 371) and 7 (to Dismiss Counts 4 and 5 for Failure to State an Offense Under 18

U.S.C. §§ 2(b) and 1001 (Soft Money)) and will be retained pending disposition of those motions.

Ms. Hsia challenges the use of the designation "a/k/a Hsia Ling" in the caption and in paragraph 1 of the indictment, the only two references to her by that name. "Hsia Ling" is the given name of Ms. Hsia, who was born in China. While "Hsia Ling" is not an alias in the traditional sense, the given name of a foreign-born defendant is somewhat analogous to an alias especially where, as here, the foreign name is preceded by "A/K/A." The use of aliases in indictments is disfavored, see United States v. Wilkerson, 456 F.2d 57, 59 (6th Cir.), *cert. denied,* 408 U.S. 926 (1972); United States v. Ramos, 839 F. Supp. 781, 787 (D. Kan. 1993), and aliases should only be retained when "the Government intends to introduce evidence of an alias and the use of that alias is necessary to identify the defendant in connection with the acts charged . . ." United States v. Clark, 541 F.2d 1016, 1018 (4th Cir. 1976).

The Court agrees with Ms. Hsia that including both names in the indictment in this case is both unnecessary and prejudicial, and the references in the caption and in paragraph 1 of the indictment to "a/k/a Hsia Ling" therefore will be stricken. It is significant that there are no allegations in the 27-page indictment that refer to her by that name, suggesting that neither she nor any of her co-conspirators ever used the name Hsia Ling in connection with the acts charged in the indictment. At oral argument, however, the government stated that two of the documents it intends to introduce at trial refer to Ms. Hsia as Hsia Ling and that some government witnesses may know Ms. Hsia only as Hsia Ling. If those documents are relevant and otherwise admissible, the documents, including their references to "Hsia Ling," will be admitted. Similarly, if the witnesses who know Ms. Hsia only as Hsia Ling testify at trial, they may refer to her as Hsia Ling. The

Court here holds only that the references to Hsia Ling in the caption and the introductory paragraph of the indictment are unnecessary and prejudicial.

Ms. Hsia next challenges references in Count 1 to contributions that were made to candidates for state and local elections (¶¶ 13(a), 14, 15, 29, 30, 40(f), (g), (w), (x)) and contributions to the DNC (¶¶ 16, 17, 27, 28, 31-35, 40(h)-(j), (t)-(v), (z)-(ee)) that she characterizes as "soft money." She asserts that the FEC has no authority to regulate such contributions and such contributions therefore are irrelevant to the alleged conspiracy to defraud the United States by impeding the lawful functions of the FEC. The government counters that: (1) these contributions impeded the lawful functions of the INS, because the ban on political contributions by tax-exempt organizations is not limited to "hard money" contributions; and (2) in the case of the contributions to the DNC, the government intends to prove at trial that these were actually "hard money" contributions. Government's Opposition at 86-88. Ms. Hsia's assertions that (1) her alleged actions could not have impeded the INS; and (2) as a matter of law her contributions cannot be considered hard money are inescapably intertwined with her Motions 3 (to Dismiss Count 1 of the Indictment for Failure to State an Offense under 18 U.S.C. § 371) and 7 (to Dismiss Counts 4 and 5 for Failure to State an Offense Under 18 U.S.C. §§ 2(b) and 1001 (Soft Money)), on which the Court has not yet ruled.[7] Until the Court rules on those motions, striking these references as irrelevant would be premature. If Ms. Hsia prevails on Motions 3 and/or 7, the Court will reconsider the request to strike these references.

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[7] Motion 7 concerns Counts 4 and 5, while the references that Ms. Hsia challenges here are part of Count 1, but the contributions to the DNC alleged in Counts 4 and 5 are a subset of those alleged in Count 1. See Indictment at ¶¶ 27, 28, 31-33, 40(t)-40(v), 40(z)-40(bb), 47-52.

The Court is concerned about references in the indictment to acts of concealment, cover-ups and the destruction and alteration of documents in November 1996, see Indictment at ¶¶ 13(e), 40(qq)-(ss), in part because the allegations provide little detail about the acts, and because references to the alleged acts of concealment and cover-up suggest the inclusion of offenses that are not part of the conspiracy charged in the indictment, which otherwise seems to encompass a conspiracy ending on or about October 24, 1996. See United States v. Weinberger, 1992 WL 294877, at *7 ("Language that serves no purpose and encourages a jury to draw inferences that a defendant was involved in collateral activities irrelevant to the indictment may be stricken"); United States v. Hubbard, 474 F. Supp. 64, 83 (D.D.C. 1979) (striking references to other offenses).

If the alleged conspiratorial agreement included an agreement to engage in acts of concealment and cover-up such as those described in the indictment, those acts could be overt acts in furtherance of the conspiracy or a part of the manner and means of the conspiracy, and reference to them should not be stricken. If the alleged acts of concealment and cover-up were taken after the original conspiracy was completed or in furtherance of a subsequent and separate conspiratorial agreement, however, the acts are neither overt acts in furtherance of the alleged conspiracy charged in the indictment nor the manner and means of committing the alleged conspiracy. The fact that concealment is not inconsistent with the alleged conspiracy is not enough to establish that it was within the scope of the original agreement. "Acts of covering up . . . cannot *themselves* constitute proof that concealment of the crime after its commission was part of the initial agreement among the

conspirators." See Grunewald v. United States, 353 U.S. 391, 402 (1957) (emphasis added).[8]

On the basis of the allegations in the indictment that the acts of concealment, cover-up and destruction of documents were in furtherance of the scheme to defraud that has been alleged, the Court will deny Ms. Hsia's request to strike these references. If the bill of particulars ordered by the Court confirms Ms. Hsia's assertion that such acts of concealment and cover-up were not encompassed within the alleged scope of the original conspiratorial agreement, however, her motion to strike will be granted.[9] Otherwise, Ms. Hsia would be entitled to a jury instruction that if the government fails to prove that an agreement to conceal was part of the conspiracy to defraud the United States or otherwise to clearly establish the relevance of the alleged acts of concealment, evidence as to those alleged acts is irrelevant and should be disregarded.

The indictment includes several references to President Clinton and Vice President Gore, primarily in connection

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[8] The government asserts that post-conspiracy acts of concealment, even if not encompassed within the scope of the charged conspiracy, are relevant to proving the existence of that conspiracy. See Anderson v. United States, 417 U.S. 211, 218-21 (1974); United States v. Lutwak , 344 U.S. 604, 617 (1953); United States v. Green, 594 F.2d 1227, 1229 n.1 (9th Cir. 1979). While post-conspiracy acts of concealment may be admissible at trial, the analysis for admissibility at trial is distinct from the issue of whether post-conspiratorial acts can be alleged in the indictment either as overt acts in furtherance of the conspiracy or as the manner and means of the conspiracy. See United States v. Green , 594 F.2d at 1229 (court admits evidence of post-conspiratorial acts but notes that "including the agreement to conceal as part of the original conspiracy was improper" and probably should have been stricken if defense had timely objected).

[9] See further discussion infra at 31-33 concerning bill of particulars as to scope of the original conspiratorial agreement and details of the alleged concealment and cover-up.

with their attendance at various fund-raising events, Indictment at ¶¶ 16, 27, 31, 34, 40(y) & (z), and Ms. Hsia contends that these statements are irrelevant and prejudicial. These references, however, plausibly provide context for the conspiracy charge with respect to Ms. Hsia's motive in soliciting the donations and might also be relevant to the issue of whether the donations were intended to influence a Federal election and therefore constitute "hard money." The government is not precluded from including information in the indictment used "to place the defendant's actions in context and to establish the defendant's state of mind, intent and motives." United States v. Weinberger, 1992 WL 294877, at *7. In context, the references to the President and the Vice President are potentially relevant and do not appear to be prejudicial. The references therefore will not be stricken.

Ms. Hsia also challenges the use of several potentially inflammatory words such as "unlawful," "secret, disguised and illegal," "illegal," "straw donors," "conduit," "long-standing pattern," "covered-up," and "falsely." See Indictment at ¶¶ 11, 12, 13(a), (b), (c) & (e), 15, 17, 19, 26, 28, 30, 33, 35, 40(rr) & (ss), 42. It is inappropriate to use potentially inflammatory language in an indictment when not absolutely necessary. See United States v. Espy, 989 F. Supp. 17, 37 (D.D.C. 1997) ("A more neutral term should be employed . . . without altering the essential substance"), *aff'd in part, rev'd on other grounds,* 1998 WL 312146 (D.C. Cir. June 16, 1998); United States v. Hubbard, 474 F. Supp. at 83 ("colorful words . . . improper where less colorful and more accurate words would suffice"). On the other hand, *relevant* language generally "should not be stricken even if it may be prejudicial." See United States v. Weinberger, 1992 WL 294877, at *7.

Reading the challenged words in context, the Court finds that most are directly relevant to the offenses charged

and are not overly prejudicial. Ms. Hsia's challenge to these words seems to rely heavily on the fact that they denote illegal activity which has not yet been proven. See Defendant's Reply No. 3 at 6. Whether the conduct at issue is illegal, of course, is a decision for the jury at trial. It would be very odd to limit indictments to descriptions of legal acts or to illegal acts which have already been proven, especially since "[t]here is no requirement that the government must prove its theory of the case in the indictment." See United States v. Espy, 989 F. Supp. at 36.

In some instances, however, the challenged phrases are unnecessarily inflammatory and their omission would not essentially alter the substance of the indictment. The phrase "secret, disguised and illegal," see Indictment at ¶ 13(a), adds no more information than a simple assertion of "illegal" and the assertions of conduit contributions in subsequent paragraphs. The phrase "long-standing pattern," see Indictment at ¶ 13(c), is a characterization which the Court finds unnecessary in light of the fact that the indictment later alleges specific dates and the fact that paragraph 13(c) sufficiently alleges the "us[e of] conduits to disguise illegal corporate contributions" without reference to a "long-standing pattern." Accordingly, the Court will strike the words "secret, disguised and" in paragraph 13(a) and "engaging in a long-standing pattern of" in paragraph 13(c). The other words and phrases connoting illegal activity that Ms. Hsia challenges are relevant to the allegations and will not be stricken.[10]

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[10] Ms. Hsia also has challenged the use of the term "cover-up" in tandem with the word "conceal." The Court concludes that the use of the term "cover-up" is not unduly inflammatory provided that the allegations of cover-up and concealment are a part of the alleged conspiracy. As long as the bill of particulars provided by the government indicates that the alleged acts of concealment were within the scope of the conspiracy charged in the indictment, see infra at 31-33, the Court will not strike the term "cover-up." If the bill of particulars indicates that the alleged acts of

Finally, Ms. Hsia challenges the use of the phrases "among others" and "and elsewhere" from the introductory statement in the paragraph listing overt acts in furtherance of the conspiracy. See Indictment at ¶ 40 ("the following overt acts, among others, were committed in the District of Columbia and elsewhere"). Ms. Hsia argues that these phrases accuse her "of criminal acts in addition to those explicitly charged in the substantive counts." See United States v. Espy, 989 F. Supp. at 35. The Court disagrees. These phrases do not accuse Ms. Hsia of additional criminal acts; at most, they suggest that there were additional overt acts some of which, in and of themselves, may have been innocent. See United States v. Alvarez, 610 F.2d 1250, 1255 n.5 (5th Cir. 1980), *cert. denied,* 451 U.S. 938 (1981); United States v. Masiello, 491 F. Supp. 1154, 1164 (D.S.C. 1980). The government need not identify all overt acts in furtherance of a conspiracy in the indictment, and these phrases ensure that the government can, if necessary, prove additional overt acts at trial. United States v. Trie, 1998 WL 427550, at *13. In addition, since it is sufficient if at least one overt act has been committed in the District of Columbia and only eight in fact were committed here, see supra at 8-9, there is no conceivable prejudice in indicating that others may have occurred elsewhere. Accordingly, these phrases will not be stricken.

IV. DISCOVERY, BRADY AND BILL OF PARTICULARS

A. Defendant's Motion 14, to Compel Discovery and Disclosure of Exculpatory Information

Early in the case, the government provided Ms. Hsia and her counsel with "open file" discovery. The government provided them with access to over 600,000 documents that it

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concealment were not within the scope of the charged conspiracy, all references to cover-up and concealment will be stricken. See supra at 17.

had collected in the course of its investigation. Ms. Hsia's initial motion complained that it was literally impossible for her counsel to cull through the 600,000 documents and identify the potentially relevant documents from this mass of paper. Since the filing of Ms. Hsia's motion, the government has provided her with three notebooks of information that it claims contain the relevant documents. While Ms. Hsia asserts that she has lost valuable trial preparation time as a result of the government's refusal to provide her with a list of the relevant documents earlier, she has narrowed her request (1) to compel discovery of her own statements pursuant to Rule 16 of the Federal Rules of Criminal Procedure, (2) to establish a schedule for production of material pursuant to the Jencks Act, 18 U.S.C. § 3500, and (3) to compel disclosure of information pursuant to Brady v. Maryland, 373 U.S. 83 (1963).

1. Rule 16

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides, in relevant part, that "[u]pon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government . . . " Ms. Hsia claims that the government has failed to produce a list identifying her statements or documents designated as her statements. Defendant's Reply No. 5 at 4. The government contends that it has provided defense counsel with copies of all of Ms. Hsia's statements and that Ms. Hsia is not entitled to a detailed index of those statements. Government's Opposition at 106. While the government is not obligated to provide Ms. Hsia with an index of her statements, it is not sufficient for the government to claim that she has had access to all statements through the

government's open-file discovery. To the extent that the government has statements of Ms. Hsia's that it has not yet provided to her other than through its open-file discovery, it is required to disclose those statements to her pursuant to Rule 16.

2. Jencks Material

The government has agreed to provide material pursuant to the Jencks Act, 18 U.S.C. § 3500, "48 hours prior to direct testimony by each respective government witness." Government's Opposition at 117. While counsel for Ms. Hsia concedes that this ordinarily would be a reasonable proposal, she contends that releasing Jencks material only 48 hours prior to a witness' direct testimony in this case likely will lead to significant delays in trial. Ms. Hsia points out that many of the government's witnesses do not speak English, and to the extent that their statements are in Chinese, Ms. Hsia's counsel will have to translate those statements into English before she can determine whether and how she can use any of the material in cross-examination. Furthermore, at the hearing, Ms. Hsia's counsel stated that while Ms. Hsia speaks English quite well, she understands documents better if they are translated into Chinese, and it would be helpful if she could have at least some of the Jencks material translated for Ms. Hsia. The government argues that since this is a conspiracy case and Ms. Hsia has had close relationships with some of the government witnesses, the government is reluctant to release Jencks material for all witnesses more than 48 hours in advance of direct testimony.

The Court is concerned that translation issues could lead to trial delays. The Court therefore has directed the parties to seek agreement on a schedule for release of Jencks material (including, of course, reverse Jencks material pursuant to Rule 26.2, Fed. R. Crim. P.) in order to accommodate the translation concerns of Ms. Hsia and the

concerns of the government. In setting the schedule, it appears that it would be reasonable for the government: (1) to release Jencks material for many of the English-speaking witnesses more than 48 hours in advance of their direct testimony, so that Ms. Hsia's counsel can have the material translated for Ms. Hsia if necessary; (2) to release Jencks material for non-English speaking witnesses whose statements are in Chinese even earlier, so that there is sufficient time for Ms. Hsia's counsel to have the material translated into English and to prepare for cross- examination; and (3) to release Jencks material for those witnesses about whom the government has specific concerns 48 hours in advance of their direct testimony. If the parties cannot agree on a reasonable schedule pursuant to this guidance within two weeks, the Court will enter, as part of the trial management order it intends to issue in this complex case, an order setting a disclosure schedule.

3. Brady

Ms. Hsia complains that the government has not been forthcoming in its production of material pursuant to Brady v. Maryland, 373 U.S. 83 (1963). She claims that she has received literally no Brady material from the government and maintains that is virtually impossible that there would be no Brady material in a case involving an in-depth investigation of this magnitude with presumably extensive grand jury testimony, FBI interviews, and testimony and interviews on Capitol Hill. While the government has represented that it "understands its Brady obligations and it fully intends to abide by them," Government's Opposition at 111, the Court shares defense counsel's skepticism.

Under the standard articulated in Brady v. Maryland , 373 U.S. 83 (1963), the government must disclose any evidence in its possession that is favorable to the accused and material either to a defendant's guilt or punishment. As an

initial matter, it is important to set out several basic propositions of Brady jurisprudence. First, "favorable evidence" for purposes of Brady encompasses both evidence that is exculpatory and evidence that could be used to impeach a government witness. United States v. Bagley, 473 U.S. 667, 676-77 (1985).

Second, the existence of a duty to disclose witness statements at trial pursuant to the Jencks Act, 18 U.S.C. § 3500, does not eviscerate the government's Brady obligation to disclose witness statements well in advance of trial if portions of those statements also fall under Brady. See United States v. Tarantino, 846 F.2d 1384, 1414 n.11 (D.C. Cir.), *cert. denied,* 488 U.S. 867 (1988). This is important because the government is required to disclose Brady material in sufficient time for the defendant to "use the favorable material effectively in the preparation and presentation of its case," United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir.), *cert. denied,* 429 U.S. 924 (1976), while Jencks material is not required to be disclosed until after the witness has testified.

Third, the fact that a person may have testified in the public realm, either before Congress or in another public arena, does not relieve the government of its Brady obligation if that person has made statements to the government that are both favorable and material to Ms. Hsia's guilt or punishment; it is unacceptable for the government to take the position that a person's statement does not constitute Brady material simply because the person made a similar statement in a public forum.

Fourth, open-file discovery does not relieve the government of its Brady obligations. The government cannot meet its Brady obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have

been able to find the exculpatory information in the haystack. To the extent that the government knows of any documents or statements that constitute Brady material, it must identify that material to Ms. Hsia.

Finally, it is important to note that courts in this jurisdiction look with disfavor on narrow readings of the government's Brady obligations; it simply is insufficient for the government to offer "niggling excuses" for its failure to provide potentially exculpatory evidence to the defendant, and it does so at its peril. See United States v. Paxson, 861 F.2d 730, 737 (D.C. Cir. 1988).

At the same time, however, the government is not required to "deliver [its] entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." United States v. Bagley, 473 U.S. at 675. Moreover, it is the government's responsibility in the first instance to determine whether information in its possession is Brady material.

Beyond these general warnings, it is not the court's role to "referee . . . disagreements about materiality and supervise the exchange of information," United States v. McVeigh, 954 F.Supp. 1441, 1451 (D. Colo. 1997), and the Court has little choice at this juncture but to accept the government's representation that it will immediately disclose any and all Brady material that it has, or discovers that it has, in its possession. The government must bear in mind, however, that it has the "affirmative duty to resolve doubtful questions in favor of disclosure," and that "if the sword of Damocles is hanging over the head of one of the two parties, it is hanging over the head of the [government]." United States v. Blackley, 986 F. Supp. at 607 (internal quotations omitted). More fundamentally, the government would do well to remember that "the prosecutor's role transcends that of an

adversary: he [or she] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. ' " United States v. Bagley, 473 U.S. at 675 n.6 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

B. Defendant's Motion 15, for a Bill of Particulars

Ms. Hsia requests a bill of particulars as to: (1) the identities of all other co-conspirators and the overt acts in which they participated; (2) the identification of the individuals through whom IBPS acted for all knowledge, actions or conduct attributed to IBPS; (3) the overt acts in furtherance of the alleged conspiracy not already listed in the indictment which the government intends to prove at trial; (4) the time, place, date and participants for each overt act in furtherance of the conspiracy which the government intends to prove at trial; (5) each lawful function and duty of the FEC or the INS impaired by the conspiracy, as well as how and by which overt acts it was impaired; (6) documents and entries that were destroyed or altered as part of the alleged cover-up, each individual who acted in the cover-up and the date on which the cover-up took place; (7) the IBPS personnel that Ms. Hsia contacted to solicit contributions and the manner and means of the contact; (8) all individuals who allegedly solicited contributions or were solicited for contributions, and the manner and means of the solicitations; and (9) the particular false statements alleged under Counts 2-6, what about them is false, and how Ms. Hsia caused the false statements to be made. The Court finds that Ms. Hsia is entitled to a bill of particulars as to only some of the items she has requested.

"Under [Rule 7(f) of] the Federal Rules of Criminal Procedure, it is within the sound discretion of the court to

determine whether a bill of particulars should be provided," and the Court should grant such motions as necessary to allow the defendant to adequately prepare for and to avoid surprise at trial. United States v. Espy, 989 F. Supp. at 34. A bill of particulars properly includes clarification of the indictment, not the government's proof of its case. United States v. Smith, 341 F. Supp. 687, 690 (N.D. Ga. 1972). In this case, the Court concludes that the indictment is well drafted and easy to follow. In addition, the government has provided Ms. Hsia with a set of the exhibits it intends to present in its case-in-chief at trial which, as described by both parties at oral argument, provides Ms. Hsia with substantially all the information required to prevent unfair surprise at trial.[11]

Ms. Hsia's motion for a bill of particulars is overly broad and many of her requests are without merit and therefore will not be ordered by the Court. In particular, the government need not provide details, including time, place and date, of all overt acts in furtherance of the alleged conspiracy which the government intends to prove at trial. United States v. Trie, 1998 WL 427550, at *13. There are, however, a few items requested without which Ms. Hsia will be unable to effectively prepare her defense and may be

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[11] At oral argument, the Court requested that the government provide the Court with copies of the trial notebooks that it had prepared for Ms. Hsia in order to assist the Court in determining what information is necessary in a bill of particulars. The government agreed and Ms. Hsia indicated at that time that she did not oppose such a request. After the government had delivered the notebooks, however, Ms. Hsia filed a Motion for Reconsideration in which she indicated that she was concerned that consideration of the information in the notebooks might color the Court's assessment of Ms. Hsia's substantive motions, and she requested that the Court not look at the notebooks. Upon further review of the bill of particulars motion, the opposition and reply, it does not appear that the notebooks would materially assist the Court in its decision with respect to the bill of particulars motion. The Court therefore has not looked at the notebooks and will return them to the government.

surprised at trial, and the Court therefore will grant her motion with respect to those items.

The parties agree that the names of all alleged co-conspirators have now been provided to Ms. Hsia. Given the large number of acts attributed to co-conspirators in the indictment, however, Ms. Hsia's preparation for trial will be unnecessarily complicated without knowing which acts were performed by which co-conspirators. See United States v. Trie, 1998 WL 427550, at *12. Accordingly, the Court concludes that Ms. Hsia is entitled to a bill of particulars identifying, for each relevant paragraph of the indictment, which co-conspirator performed the specified acts.

The indictment in several places identifies specific acts performed by the alleged co-conspirator IBPS. See Indictment at ¶¶ 15-40(ss). Often it is not readily apparent from an indictment who performed acts attributed to corporations, and a bill of particulars is an appropriate way to identify these individuals to help the defendant prepare for trial even when the defendant is the corporation itself. See United States v. Macleod Bureau, 6 F.R.D. 590, 593 (D. Mass. 1947) (ordering bill of particulars as to persons through whom corporate defendant became party to conspiracy in prosecution under Sherman Antitrust Act); United States v. Glen Alden Coal Co., 4 F. R. D. 211, 213 (S. D. N. Y. 1943) (same); but see United States v. Ford Motor Co., 24 F. R. D. 65, 67-68 (D.D.C. 1959) (denying such a bill of particulars because requested information was within the scope of the corporate defendant's knowledge). In this case, where the defendant is not the corporation at issue but a third party, the defendant's need for information as to individuals who acted for the corporation is even more compelling. The Court concludes that the failure to provide anything more specific than "IBPS" as the co-conspirator responsible for the alleged acts would unnecessarily burden Ms. Hsia's pre-trial

preparation. Accordingly, the Court will grant a bill of particulars as to the names of the individuals who performed each act by IBPS alleged in paragraphs 15-40(ss), and the names of the individuals who acted on behalf of IBPS to form the alleged conspiratorial agreement with Ms. Hsia.

Ms. Hsia also requests information as to the lawfal functions or duties of the FEC and the INS that were impeded by the alleged scheme, as well as how and by which overt acts those functions or duties were impeded. The Court finds this request much too broad and, with respect to the FEC, unnecessary for trial preparation. In context, the connection between the functions of the FEC, see Indictment at ¶¶ 5-6, and the alleged scheme to prevent the FEC from learning that IBPS had allegedly made unlawful political contributions, see Indictment at ¶ 11, is not so vague or ambiguous as to create a significant risk of surprise at trial.

The second object of the conspiracy is another matter. The indictment specifies general INS functions, see Indictment at ¶¶ 7-8, the manner and means of the conspiracy to impair the INS, see Indictment at ¶ 13(d), and overt acts which could have impeded those functions. See Indictment at ¶¶ 40(c)-(e). The connection between the functions of the INS and how those functions were impeded by Ms. Hsia and her alleged co-conspirators, however, is not clearly specified. The fact that a plausible connection may be inferred by a reader of the indictment does not provide sufficient protection against surprise at trial as to what connection the government will actually attempt to prove. Because the indictment is far from crystal- clear, the Court at oral argument asked government counsel about the connection between Ms. Hsia's activities and the lawful functions of the INS. The response of the government was not illuminating:

> Ms. Hsia was an immigration consultant who did immigration work for the Temple, and one important part of that was the ability to bring in religious workers for 501c3 religious organizations upon presentation of documentation establishing that the religious organization met those criteria. And the Government alleges that it was an important part of this conspiracy to conceal from the INS the political activities that the Temple was engaged in because if information concerning that did come to the attention of the INS, that would have raised a question as to whether or not the Temple status under 501c3 should be examined . . . I don't think the indictment specifically goes into [that] reasoning or the analysis . . . but the Government submits that that would be its argument as to the purpose of that.

Transcript at 193-94. The Court therefore concludes that Ms. Hsia is entitled to a bill of particulars explaining with specificity which lawful functions of the INS were allegedly impeded and how they were impeded.

Ms. Hsia asserts that she has insufficient information about the false statements alleged in Counts 2-6. By contrast to the indictment in Trie, the indictment in this case presents extremely detailed information that would appear to be sufficient to identify exactly which statements are the subject of the indictment. At oral argument the government clarified that the false statements are the reports filed with the FEC, rather than the checks by which contributions were made, and that the names reported for those contributions are what is allegedly false. Ms. Hsia now concedes that the government has shown her all the statements at issue. On the other hand,

the government still has not provided a coherent explanation of how Ms. Hsia "caused" those false statements to be made. Accordingly, the Court will order a bill of particulars disclosing how Ms. Hsia is alleged to have caused each of the false statements to be made.

Ms. Hsia also requests detailed information as to the acts of concealment alleged in paragraphs 13(e) and 40(qq)-(ss). She asserts that the government has produced copies of allegedly altered checks but nothing pertaining to the allegations in paragraphs 40(qq) and (ss) of the indictment, which allege conspiracy, cover-up and destruction and alteration of documents in November 1996, when the conspiracy appears from the indictment otherwise to have concluded on or about October 24, 1996. She contends that the alleged acts of concealment and cover-up occurred after the principal objects of the conspiracy were accomplished and that they therefore are not a part of the underlying conspiracy. She further asserts that the government has not specified by whom and when the acts of concealment were performed or the connection between the acts of concealment and the conspiracy alleged. See Defendant's Reply No. 5 at 10.

As is often the case when a conspiracy is charged, "the scope of the conspiratorial agreement" is the key to determining whether "an overt act may properly be regarded as in furtherance of the conspiracy." Grunewald v. United States, 353 U.S. at 402. There is a crucial distinction between "acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." Id. at 405. As Justice Kennedy has explained, "[i]f the principal objects of a conspiracy have been accomplished before an act of concealment . . . then in all but the unusual case the conspiracy has ended before the cover-up begins, and one who conceals

the completed crime is not by that act guilty of conspiracy to commit the substantive offense." United States v. Green, 594 F.2d at 1229. The Court agrees with Ms. Hsia that without more information the connection between the acts of concealment alleged in paragraphs 13(e) and 40(qq)-(ss) and the alleged conspiracy is tenuous and may be non-existent. It therefore will order a bill of particulars as to the scope of the alleged conspiratorial agreement and in particular whether and how the acts of concealment alleged in the indictment were within the scope of the conspiracy charged.

Beyond the infirmity just discussed, the indictment does not provide Ms. Hsia with sufficient information about the specific acts of concealment alleged for her to adequately prepare her defense and avoid surprise at trial. The indictment alleges that the acts of concealment were performed by IBPS, and the Court has found that Ms. Hsia is entitled to a bill of particulars specifying the names of the individuals who performed each alleged act in the indictment that is attributed to IBPS. See supra at 29. In addition, because the government has not provided details concerning the documents allegedly destroyed and alleged alterations in IBPS' general ledgers, see Indictment at ¶¶ 40(qq) & (ss), the Court finds that in order to prepare her defense, Ms. Hsia is entitled to sufficiently specific information concerning the documents allegedly destroyed and alleged alterations in IBPS' general ledgers to adequately identify those acts of concealment and their relationship to the alleged conspiracy.

Finally, for the reasons stated in.United States v. Trie, 1998 WL 427550, at *14, if the government discovers additional information related to these areas after providing Ms. Hsia with the bill of particulars required by this Opinion, it may supplement its bill of particulars to include the new information.

An Order consistent with this Opinion shall be issued this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 8/13/98

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 98-0057 (PLF)
MARIA HSIA,	)	
Defendant.	)	

OPINION

This case is before the Court on defendant's Motion No. 1 (to Dismiss the Indictment for Violation of Due Process), Motion No. 2 (to Dismiss Counts in the Indictment for Their Positive Repugnance to the Federal Election Campaign Act), Motion No. 3 (to Dismiss Count 1 of the Indictment for Failure to State an Offense), Motion No. 5 (to Dismiss Counts 2 through 6 for Failure to State an Offense (Causation)), Motion No. 6 (to Dismiss Counts 2 through 6 for Failure to State an Offense (False Statements)), Motion No. 7 (to Dismiss Count 4 and 5 for Failure to State an Offense (Soft Money)), Motion No. 9 (to Dismiss Indictment Because it Offends the First Amendment) and Motion No. 10 (to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia). For the reasons discussed below, the Court dismisses Counts 2-6, the false statements counts, and denies all other motions.[1]

[1] With one exception, the Court already has dealt with the other pretrial motions that were argued on July 27 and 28, 1998. See Opinion of August 13, 1998. The remaining motion, Motion No. 4 (to Dismiss

I. BACKGROUND

Maria Hsia has been indicted on one count of conspiracy to defraud the United States by impairing and impeding the Federal Election Commission ("FEC") and the Immigration and Naturalization Service ("INS"), in violation of 18 U.S.C. § 371, and five counts of causing others to file false statements with the FEC, in violation of 18 U.S.C. §§ 1001 and 2(b). All six counts are predicated on political campaign solicitations by Ms. Hsia that allegedly involved the use of "conduit" contributors to hide the "true" or "actual" sources of the funds in violation of various provisions of the Federal Election Campaign Act ("FECA"), 2 U.S. C. § § 431, et. seq.

FECA provides a detailed and comprehensive scheme to regulate the financing of federal elections by, among other things, limiting contributions to electoral campaigns and requiring candidates to report receipts and expenditures. Of specific relevance to this case, FECA provides that "[n]o person shall make contributions" that exceed certain limits set forth in the statute, 2 U.S.C. § 441a; that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution," 2 U.S.C. § 441f; and that it is unlawful for "any corporation whatever . . . to make a contribution or expenditure in connection with any election at which presidential or vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices." 2 U.S.C. § 44lb(a).

Indictment Because It Is Tainted) is dealt with in a separate Memorandum Opinion and Order issued today.

A "contribution" is defined by the statute, in relevant part, as "money or anything of value made by any person for the purpose of influencing any election for *Federal* office." See 2 U.S.C. § 431(8)(A) (emphasis added).[2] Because most of FECA's restrictions apply only to funds contributed "for the purpose of influencing any election for Federal office," many political committees have set up separate accounts for money that has been donated: money that has been contributed subject to the proscriptions of FECA ("hard money") is deposited into a "federal" account and is used to finance federal election campaigns, while all other money that is donated ("soft money") is deposited into a "non-federal" account and is used for, among other things, state and local campaigns or issue advertising.

FECA requires "political committees," including national political parties, to exert "best efforts" to identify each person who made "contribution[s]" in the aggregate annual amount of $200 or more and to report that information to the FEC. 2 U.S.C. §§ 432(i), 434. FEC regulations require national political party committees to report *any* receipt of funds over $200, regardless of whether the funds are deemed "hard" or "soft" money. 11 C.F.R. § 104.8(a), (e). The statute charges the Federal Election Commission with the administration of FECA and grants the FEC exclusive jurisdiction over civil enforcement. 2 U.S. C. § 437c. It provides for both civil and criminal enforcement, and specifies criminal penalties for certain violations, up to a maximum of one year imprisonment and/or a fine. 2 U.S.C. § 437g(d). The Department of Justice prosecutes criminal violations of the statute. 2 U.S.C. § 437g(a)(5)(C).

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[2] "Contribution" is separately and more broadly defined for purposes of 2 U.S.C.§ 441b. 2 U.S.C. § 441b(b)(2). The separate definition, however, is irrelevant to this case.

Count 1 of the indictment charges that Ms. Hsia, a Buddhist, conspired with the International Buddhist Progress Society ("IBPS"), a tax-exempt religious organization doing business as the Hsi Lai Temple (the "Temple"), and other unnamed co-conspirators to defraud the United States by impairing, obstructing, impeding and defeating the lawful functions and duties of the FEC and the INS in violation of 18 U.S.C. § 371.[3] The indictment alleges that Ms. Hsia solicited IBPS to make contributions and donations through "conduits" (some of whom were monks, nuns and volunteers from IBPS) and that Ms. Hsia in some instances acted as a conduit for donations or contributions. The indictment alleges that Ms. Hsia (1) impaired and impeded the FEC by concealing the fact that IBPS was the true source of the contributions, and (2) impaired and impeded the INS by submitting documents to the INS stating that IBPS was not participating in political campaigns so that the INS would permit foreign nuns and monks associated with IBPS to enter or remain in the United States when she knew that IBPS in fact was making political contributions.

Counts 2-6 charge Ms. Hsia with causing the making of false statements to the FEC in violation of 18 U.S.C. §§ 2 and 1001. These counts appear to be based on conduct similar to (if not the same as) that alleged in Count 1. The indictment alleges that Ms. Hsia knowingly and willfully caused various political committees to submit material false statements to the FEC by concealing the identity of the true source of contributions from the committees which relayed the false information to the FEC. Each count addresses a different report submitted to the FEC by a political committee which allegedly contained false statements about the identity of actual contributors. Count 2 pertains to a July 18, 1995 report

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[3] IBPS has not been indicted for its alleged role in the conspiracy.

and Count 3 to an October 17, 1995 report by the Clinton-Gore '96 Committee; Count 4 relates to an April 15, 1996 report and Count 5 to a July 15, 1996 report by the Democratic National Committee; and Count 6 pertains to an October 24, 1996 report by the Patrick Kennedy Committee. Counts 2 and 3 do not identify the actual source of the contributions, but Counts 4-6 allege that IBPS was the actual contributor. Counts 2-6 all allege that Ms. Hsia solicited the contributions at issue, but only Count 6 alleges that Ms. Hsia herself wrote a contribution check for which she was reimbursed by IBPS.

II. MOTIONS TO DISMISS INDICTMENT ON FIRST AMENDMENT GROUNDS

A. Defendant's Motion To Dismiss Indictment For Its Positive Repugnance to the Federal Election Campaign Act

Ms. Hsia argues that the Federal Election Campaign Act, 2 U.S.C. § 431, et. seq., impliedly repeals the more general provisions of the Federal Criminal Code, specifically the false statements statute, 18 U.S.C. § 1001, and the conspiracy statute, 18 U.S.C. § 371. This Court already has ruled that under accepted principles of statutory construction, repeals by implication are not favored and there must be substantial evidence that Congress expressly intended to preempt a general statute with a more specific statutory scheme in order to deprive a prosecutor of discretion to determine on which of a variety of seemingly applicable statutes to base a prosecution. Under this traditional analysis, FECA does not impliedly repeal or preempt the more general criminal statutes on which the prosecutor and grand jury have proceeded. See United States v. Trie, Criminal No. 98-0029, 1998 WL 427550, at *9 (D.D.C. July 17, 1998). Ms. Hsia maintains, however, that because the conduct regulated by FECA is political speech subject to First Amendment

protection and because Congress carefully crafted and later amended FECA in order to avoid infringing on First Amendment rights, FECA necessarily occupies the field and impliedly repealed more general criminal statutes that are not tailored to protect First Amendment rights of political speech and association.

18 U.S.C. § 371 and 18 U.S.C. §§ 1001 broadly proscribe criminal conduct and have been applied in a wide range of circumstances. FECA, on the other hand, specifically proscribes certain conduct in the context of federal elections and provides both civil and criminal penalties for certain violations of the Act. 2 U.S.C. § 437g(d). The government does not argue that FECA's criminal provisions are unavailable to it in prosecuting Ms. Hsia. Rather, it argues that the more general criminal provisions also are available regardless of whether FECA provides a criminal penalty for the charged conduct and that the government has the discretion to decide under which statutes to proceed, the misdemeanor provisions of FECA or the felony provisions of 18 U.S.C. § 371 and 18 U.S.C. § 1001. It relies on the established principle that "whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." United States v. Batchelder , 442 U.S. 114, 124 (1979). See also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); United States v. Moore, 423 U.S. 122, 138 (1975).

Ordinarily, general criminal provisions remain available to supplement a specific statutory scheme unless there is evidence either (1) that Congress expressly intended to preempt a general statute with the more specific statutory scheme, or (2) that there is what the Supreme Court has labeled "a positive repugnancy" between the provisions of the specific statutory scheme and the more general statutes such that Congress must have intended to repeal the more general

provisions by implication. See United States v. Borden Co., 308 U.S. 188, 198-99 (1939). The parties here agree that when Congress enacted FECA it did not expressly repeal the more general criminal provisions and that repeal by implication is not favored. See United States v. Borden, 308 U.S. at 198; United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994); United States v. Hopkins, 916 F.2d 207, 218 (5th Cir. 1990); United States v. Oakar, 924 F. Supp. 232, 244-45 (D.D.C. 1996), *aff'd in part, rev'd on other grounds,* 111 F.3d 146 (D.C. Cir. 1997). The question is whether the pervasive First Amendment implications of federal election regulation necessarily alter the framework of analysis.

The Federal Election Campaign Act of 1971, Pub.L. No. 92-225, 86 Stat. 3 ("1971 FECA"), sought to regulate campaign financing in a more comprehensive way than its predecessor campaign financing statute. See e.g., H.R. Rep. No. 92-564 at 3 (1971). The major provisions of the 1971 Act focused primarily on limiting the activities of candidates for federal office, rather than on placing limitations on contributors. The Act imposed spending limits on the amount of personal funds a candidate could use in a federal election, 1971 FECA § 203, amending 18 U.S.C. § 608, and on the amount a candidate could spend for the use of communications media. 1971 FECA § 104. The Act also set forth a variety of disclosure requirements and, as part of those requirements, it prohibited contributions in the name of another, so-called conduit contributions. 1971 FECA § 310, 2 U.S.C. § 440 (1970 ed. Supp. II 1972). A number of specific criminal provisions for violations of the Act were enacted and made a part of Title 18 of the United States Code, the general Federal Criminal Code, but Congress also provided that "[a]ny person who violates any of the provisions" of Title III, Disclosure of Federal Campaign Funds, which included the prohibition against contributions in the name of another, "shall be fined not more than $1,000 or imprisoned not more than

one year, or both." 1971 FECA § 311 (a), 2 U.S.C. § 441 (1970 ed. Supp. II 1972).[4]

In 1974, Congress amended the Federal Election Campaign Act to impose individual contribution limits and overall candidate expenditure limits and to establish a Federal Election Commission. Pub.L. No. 93-443, 88 Stat. 1263 (" 1974 FECA Am."), The Senate version of the bill made the FEC the "primary civil *and criminal enforcement agency* for violation of the provisions of the Act" and provided that the Attorney General could only prosecute violations of the Act "after the [FEC] is consulted and consents to such prosecution." S.Rep. No. 93-1237 at 93 (1974) (emphasis added). The Conference Committee deleted that provision and made clear that while "the [FEC] is given power to bring civil actions in Federal District courts to enforce the provisions of the Act . . . [t]he primary jurisdiction of the [FEC] to enforce the provisions of the Act is not intended to interfere in any way with the activities of the Attorney General or Department of Justice personnel in performing their duties under the laws of the United States." H.R. Rep. No. 93-1438 at 94 (1974).

The 1974 Amendments maintained the prohibition of contributions in the name of another, but moved the prohibition to Title 18 of the United States Code. A separate criminal enforcement provision for violations of that section

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[4] The bill reported out of the Committee on House Administration imposed higher penalties for "willful" violations of the disclosure provisions and also provided that any "violation of this legislation by a person who, at the time of the violation, was a candidate for Federal elective office (other than President or Vice President) will disqualify such person from becoming a candidate for Senator, Representative, Delegate, or Resident Commissioner for a period of five years." H.R. Rep. No. 92-564, at 12-13 (1971). Those penalties did not survive.

was passed which retained the maximum one year imprisonment penalty but increased the maximum fine to $25,000. 1974 FECA Am. § 101(f)(1), adding 18 U.S.C. § 614; 1974 FECA Am. § 101(f)(4). Both in 1971 when it passed FECA and in 1974 when it amended it, Congress was aware that regulation of elections had First Amendment implications, and the issue of First Amendment rights was discussed during the crafting of FECA's provisions. See e.g., S. Rep. No. 92-229 at 122-23 (supp. views of Messrs. Prouty, Cooper and Scott) (explaining that 1971 Act did not contain limitation on individual contributions because "such a limitation probably is unconstitutional"); H. Rep. No. 92-564 at 33 (add'l. views of Mr. Frenzel) (commenting on provision of 1971 House bill that would have limited individual contributions: "the limitations of contributions by individuals may . . . be unconstitutional . . . The suppression of free speech and the reduced participation in political processes is not justified").

In 1976, the Supreme Court held that a number of the provisions of FECA unconstitutionally restricted the First Amendment rights to political expression and association. Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*). The Court first noted that the "Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Id. at 14. The Court concluded, however, that "although the Act's contribution and expenditure limits both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limits on financial contributions." Id. at 23. "The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints

on the quantity and diversity of political speech, [while limitations on contributions] entail[s] only a marginal restriction upon the contributor's ability to engage in free communication." Id. at 19-21. The Court therefore upheld the constitutionality of the contribution limitations but struck down the expenditure limits because they "place substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression . . . ." Id. at 58-59.[5]

The Court next turned to the disclosure requirements of FECA. It found that compelled disclosure "can seriously infringe on privacy of association and belief guaranteed by the First Amendment" and "cannot be justified by a mere showing of some legitimate governmental interest." Buckley v. Valeo, 424 U.S. at 64. The constitutionality of the disclosure provisions requiring major *political committees* to report contributions was not challenged, but petitioners did challenge the constitutionality of the reporting requirements that FECA imposed on *individuals* and *minor* political parties. Id. at 68. FECA required any individual who made "contributions or expenditures" aggregating over $100 to entities other than political committees or candidates to file a

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[5] One can certainly debate the wisdom of the distinctions made by the Court -- whether expenditure limitations are more intrusive of First Amendment interests than contribution limitations, whether both should have been treated the same for First Amendment purposes, and, if they were so treated, whether First Amendment principles and the furtherance of free and robust political debate would be better served by no restrictions or greater restrictions. Justice Thomas' partial dissent in Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 631- 49 (1996) (Thomas, J., dissenting in part), provides a particularly instructive discussion of the view that there is no principled reason to distinguish between contributions and expenditures for First Amendment analysis.

statement with the FEC. 2 U.S.C. § 434(e) (1970 ed. Supp. V). The Court found that in order to avoid problems of constitutional vagueness, the definition of "expenditure" had to be narrowed to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80. As construed and narrowed, the disclosure provision "bears a sufficient relationship to a substantial governmental interest" and therefore passes constitutional muster. Id. The Court noted that it was especially necessary to clearly define the scope of the reporting requirement because "the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." Id. at 76-77.[6]

The Chief Justice expressed concern that because FECA was intended to operate as a holistic response to campaign financing abuses, the decision in Buckley to strike down discrete portions of FECA would undermine the Act as a whole. See, e.g., Buckley v. Valeo, 424 U.S. at 235 (Burger, C.J., concurring in part and dissenting in part) ("the Court's result does violence to the intent of Congress in this comprehensive scheme of campaign finance . . .the Court fails to recognize that the whole of this Act is greater than the sum of its parts"). The Chief Justice, demonstrating a certain degree of prescience, also predicted that "the Court's holding will invite avoidance, if not evasion, of the intent of the Act, with 'independent' committees undertaking 'unauthorized'

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[6] In the remainder of its opinion in Buckley, the Court held (1) that the powers given to the Federal Election Commission could be exercised only by officers of the United States appointed in conformity with Article II, § 2 of the Constitution and that the Commission as constituted therefore was unconstitutional, and (2) that the public financing scheme for presidential elections was constitutional. Buckley v. Valeo, 424 U.S. at 85-143.

activities in order to escape the limits on contributions." Id. at 253 (Burger, C. J., concurring in part and dissenting in part). For similar reasons, Justice White would have upheld both the contribution and expenditure limits as constitutional: "There is nothing objectionable . . . in the attempt to insulate the political expression of federal candidates from the influence inevitably exerted by the endless job of raising increasingly large sums of money. I regret that the Court has returned them all to the treadmill . . . . The holding is perhaps not that federal candidates have the constitutional right to purchase their election, but many will so interpret the Court's conclusion in this case." Id. at 265-66 (White, J., concurring in part and dissenting in part).[7]

Rather than attempting to enact a new comprehensive law in reaction to Buckley, Congress again amended the statute. While the 1976 Amendments primarily focused on reconstituting the Federal Election Commission and correcting the constitutional violations, the Amendments also moved the criminal enforcement provisions of the Act from Title 18 and consolidated them into one provision in Title 2. Federal Election Campaign Act Amendments of 1976, Pub.L. No. 94-283, 90 Stat. 475 (May 11, 1976) ("1976 FECA Am.") §§ 112, 201. Under the new consolidated enforcement provision, any person who "knowingly and willfully commits a violation of any provision or provisions of this Act which involves the

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[7] In addition to the Chief Justice and Justice White, Justice Marshall, Justice Blackmun and now Chief Justice Rehnquist all dissented from portions of the Court's opinion. Justice Stevens, newly-appointed to the Court, did not participate. So much of our federal regulatory regimen with respect to federal elections and our practical politics having been driven by the opinion in Buckley for over two decades, perhaps it is now time -- or past time -- for both Congress and the Supreme Court to seriously reexamine it. See, e.g., Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n. 518 U.S. at 631- 49 (Thomas, J., dissenting in part).

making, receiving, or reporting of any contribution or expenditure having a value in the aggregate of $1000 or more during a calendar year shall be fined in an amount which does not exceed the greater of $25,000 or 300 percent of the amount of any contribution or expenditure involved in such violation, imprisoned for not more than 1 year, or both." 1976 FECA Am. § 201.[88] In addition, the 1976 amendments provided that where the FEC finds probable cause to believe there is such a knowing and willful violation, it may refer such apparent violation to the Attorney General, 2 U.S.C. § 437g(a)(5)(D), although such a referral is not a prerequisite to a criminal prosecution. See infra at 16.[9]

Against this backdrop of legislative and judicial decisions, Ms. Hsia argues that because FECA operates in areas protected by the First Amendment and because Congress so carefully crafted a comprehensive enforcement scheme to assure that it does not violate the Constitution, FECA necessarily *pro tanto* displaces the more general conspiracy

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[8] That provision, now codified at 2 U.S.C. § 437g(d)(1)(A), has remained essentially the same since 1976, except that the threshold level of aggregated contributions or expenditures necessary to trigger these criminal penalties has been increased to $2000 or more during a calendar year.

[9] Before the 1976 amendments, 18 U.S.C. §§ 608, 610, 611, 613, 614, 615, 616 and 617 had prohibited certain kinds of conduct in connection with federal elections, including exceeding contribution and expenditure limitations and contributing in the name of another, and each section provided a different penalty scheme for violations. Section 610 (prohibiting contributions or expenditures by national banks, corporations and labor organizations), Section 611 (prohibiting contributions by government contractors) and Section 613 (prohibiting contributions by foreign nationals) all provided for felony penalties. When the penalty provisions were consolidated and moved to Title 2, the maximum penalty for *any* violation became one year in prison and/or a fine, a misdemeanor penalty.

and false statements statutes. For her argument, she relies primarily, if not exclusively, on the D.C. Circuit's opinion in Galliano v. United States Postal Service, 836 F.2d 1362 (D.C. Cir. 1988). Ms. Hsia maintains that Galliano establishes a different framework for analysis of implied repeal in the FECA context, where a complex regulatory statute sets forth an enforcement scheme in an area permeated by First Amendment concerns.[10]

In Galliano, Americans for Phil Gramm ("APG"), a political action committee that was not the authorized committee of then-Congressman Gramm, solicited money in a series of mailings. APG's first mailing failed to include a disclaimer required by FECA stating that the solicitation was not authorized by Representative Gramm or his senatorial campaign committee. Subsequent mailings, however, did contain an appropriate disclaimer. The FEC found "probable cause" to believe that the first mailing violated FECA and entered into a conciliation agreement with APG, but it did not pursue any action with respect to the later mailings. Meanwhile, the United States Postal Service took administrative enforcement action against the APG for all of its mailings, invoking a Postal Service statute prohibiting the use of any scheme or device "for obtaining money . . . through the mail by means of false representations." 39 U.S.C. § 3005 (1982). A Judicial Officer of the Postal Service issued two remedial orders, one of which essentially directed the postmaster to stop each piece of mail addressed to APG, inspect it and return it to the sender if it was a response to

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[10] While a number of courts, including this one, have found that FECA does not replace criminal remedies, none has specifically addressed these First Amendment concerns. See United States v. Curran, 20 F.3d at 566; United States v. Hopkins, 916 F.2d at 218; United States v. Trie, Criminal No. 98-0029, 1998 WL 427550, at *9; United States v. Oakar, 924 F.Supp. at 244-45.

APG's solicitations. APG filed suit in federal court to require the Postal Service to set aside its order.

On appeal, the court of appeals held that "the Postal Service, in its enforcement of [its false statements statute], may not impose constraints upon the names or disclaimers of organizations mailing solicitations for political contributions beyond those imposed by FECA." Galliano v. United States Postal Service, 836 F.2d at 1367. In an opinion by now Justice Ginsburg, the court acknowledged the arguments of the Postal Service that Congress did not expressly repeal the Postal Service statute when it passed FECA and that "repeals by implication are not favored." Id. at 1369. Nonetheless, it concluded that to "permit the Postal Service to base findings of false representation on a political action committee's name and disclaimers that are consistent with FECA requirements would defeat the substantive objective of that Act's first-amendment-sensitive provisions." Id. at 1370. The court therefore held that if "FECA requirements are met, then as we comprehend that legislation, no further constraints . . . may be imposed by other governmental authorities." Id. The Court also held that if the mailings contained false representations of a sort not covered by FECA, for instance if APG made false representations concerning its past fundraising successes, the Postal Service could apply its false statements statute to that conduct even if the mailings were done for a political purpose. Id. at 1371.

"The tension between the general false representation provisions of [the Postal Service false statements statute] and the specific disclosure requirements of [FECA]" at issue in Galliano has clear parallels to the tension between FECA and the criminal false statements and conspiracy statutes at issue here. See Galliano v. United States Postal Service, 836 F.2d at 1367. The essence of the charges against Ms. Hsia center on alleged conduit contributions which led to false statements by

political committees in their disclosure reports to the FEC, and FECA contains a comprehensive enforcement scheme for the civil and misdemeanor prosecution of conduit contributions. See 2 U.S.C. § 437g(d). Moreover, the legislative history cited by the court in Galliano for the proposition that the name and disclaimer provisions at issue in that case specifically safeguard the "full enjoyment of the First Amendment rights of individuals and groups to make expenditures for political expression" arguably applies also to the disclosure provision at issue in this case. See H.R. Rep. No. 94-917 at 5 (1976), cited in Galliano v. United States Postal Service, 836 F.2d at 1370. The Court concludes, however, that Galliano does not control this case.

First, in Galliano, the court of appeals found that the FEC's authority displaced the authority of the Postal Service; in other words, the authority of one administrative agency under a specific statutory scheme preempted the authority of another administrative agency under a different statutory scheme. The court relied heavily on the fact that both FECA and its legislative history state that only the FEC, "and no other governmental authority," has jurisdiction to enforce the *civil* provisions of FECA. Galliano v. United States Postal Service, 836 F.2d at 1368. It therefore held that "the FEC is the exclusive *administrative* arbiter of questions concerning the name identifications and disclaimers of organizations soliciting political contributions." Id. at 1370 (emphasis added).

In this case, by contrast, Ms. Hsia proposes displacing the authority of the Attorney General, the chief law enforcement officer of the United States, to bring *criminal* charges under the general provisions of the Federal Criminal Code. The Attorney General, however, is in a fundamentally different position from administrative agencies such as the Postal Service. She is charged with prosecuting criminal

violations of the federal election laws as well as other criminal laws, and her authority is in no way limited by the FEC. See Galliano v. United States Postal Service, 836 F.2d at 1368 n. 6 (Attorney General has authority to criminally prosecute FECA violations regardless of whether FEC refers investigation to her); United States v. International Union of Operating Engineers, Local 701, 63 8 F.2d 1161 (9th Cir. 1979) (same). Unlike the situation presented in Galliano, there is no issue of another agency infringing on the FEC's authority; in this case, the authority to criminally prosecute rests exclusively with the Attorney General.

Second, the court in Galliano found it significant that the FEC is required to conciliate civil violations of FECA prior to instituting any formal civil enforcement action. See 2 U.S.C. § 437g(a)(4). If conciliation is not successful, the FEC cannot administratively impose civil penalties; instead it must institute a civil action in federal district court. See 437g(a)(6)(A). If the Postal Service had the authority to administratively impose sanctions for conduct that is covered by FECA, the "first-amendment-prompted arrangements Congress devised for FECA enforcement actions" would be sacrificed. Galliano v. United States Postal Service, 836 F.2d at 1370.

The "first-amendment prompted" conciliation provisions, however, apply only to civil enforcement actions and do not apply to criminal actions. See 2 U.S.C. § 437g(a)(5)(C). Because the Attorney General may directly prosecute violations of FECA regardless of whether the FEC has attempted to conciliate the violation, see United States v. International Union of Operating Engineers, Local 701, 638 F.2d at 1163, no procedural protection is sacrificed by allowing her to charge violations under the general provisions of the Federal Criminal Code as well as under FECA. Moreover, unlike the Postal Service in Galliano, the Attorney

General cannot impose penalties for violations of criminal statutes without instituting a proceeding in court. Regardless of whether she chooses to criminally prosecute someone under FECA or under a more general provision of the Federal Criminal Code, she must institute an action in a court of law. Allowing the Attorney General to proceed under general provisions of the Federal Criminal Code rather than exclusively under FECA therefore sacrifices none of the "first-amendment prompted" procedural protection of FECA.[11]

Third, the court in Galliano focused on the fact that the finding of the Postal Service that the statements were misleading was inconsistent with the FEC's determination that the solicitations met the disclaimer requirements of FECA. The criminal provisions at issue in this case, however, rely for their meaning on the proscriptions and the definitions of FECA itself, and the definition of "contribution" and other relevant terms will control the scope of the jury's considerations and be included as part of the jury instructions.[12] The criminal statutes invoked merely provide additional enforcement mechanisms; they do not seek to penalize conduct that is expressly permitted by FECA. If this were a case in which Ms. Hsia was being prosecuted for

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[11] There are, however, other constitutional constraints on her choice of statutes which are discussed infra at 39-60.

[12] The government's theory in this case clearly revolves around conduct related to "contributions," and the Court already has indicated that "the easiest way to deal with [the definition of contribution is] just to tell the jury what Congress says it means and say [that] as a matter of law contribution means what is set forth in [2 U.S.C. § 431(8)(a)]." Transcript of July 27-28, 1998 Oral Argument ("Transcript") at 124. The government has agreed that it must "show in the circumstances of the case that [the alleged contributions at issue] fall[] within the definition of hard money as is set forth [in FECA]. That these checks were intended ultimately to be for the purpose of going towards a federal election." Transcript at 151.

conduct that was permissible under FECA, Galliano would be more on point. In this case, however, the conduct allegedly at issue --the use of conduits to conceal corporate contributions from the FEC -- is specifically proscribed by FECA; there is no inconsistency between FECA and the general criminal provisions employed by the government here.

Nor is there *any* indication in the language or legislative history of FECA to indicate that Congress intended the criminal provisions of the Act to displace any of the more general federal criminal provisions in Title 18 of the United States Code. In the 1976 Amendments, Congress created one criminal penalty provision in Title 2 for violations of FECA and relocated the various criminal penalties for FECA violations that had been in Title 18. 1976 FECA Am. § 201, 2 U.S.C. § 437(g). The legislative history concerning the new FECA criminal provision, however, focused on the need to simplify the enforcement scheme and makes no mention of repealing the more generally applicable provisions of Title 18. H.R. Rep. No. 94-917 at 3 (1976) ("[o]n the occasion of reconstituting the Federal Election Commission the Committee concluded that it was appropriate to simplify and rationalize the present enforcement system"). The only legislative history cited by Ms. Hsia indicating that Congress may have reduced criminal enforcement power when it consolidated the criminal provisions is in the statements of those who were opposed to the legislation, not those who supported it. See Def's Motion No. 3 at 7. The characterizations of opponents to legislation, however, are entitled to little weight. See United States v. International Union of Operating Engineers, Local 701, 638 F.2d at 1168.

While the defendant's preemption argument is intriguing, it ultimately fails. Wisely or not, Chief Justice Burger's holistic approach to the statute was rejected in Buckley, and there is no language or legislative history

anywhere in the "comprehensive scheme" that is FECA to indicate that Congress intended to repeal any of the general criminal provisions of Title 18 when it enacted or amended the statute. Finally, while there are facial similarities between the situations presented by Galliano and this case, the significant differences that appear upon careful analysis ultimately carry the day. The Court therefore concludes that FECA does not displace *pro tanto* the general criminal provisions of 18 U.S.C. § 371 and 18 U.S.C. §§ 1001 and 2(b).

B. Defendant's Motion to Dismiss Indictment Because It Offends the First Amendment (Religion)

Ms. Hsia next asserts that the indictment infringes on the right to free exercise of religion in violation of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. The indictment is premised on the government's allegation that Ms. Hsia orchestrated a scheme in which monks and nuns from the Hsi Lai Temple wrote checks to political committees for which they were reimbursed. According to the government, the contributions therefore were made with money that "actually" belonged to the Temple and the monks and nuns were acting as conduits for the Temple, the "true contributor."

Ms. Hsia maintains that the government's theory misperceives religious doctrine and the role and use of wealth within the Buddhist community at the Temple. According to her, the Temple does not possess "property" separate from the monks' and nuns' property; all of the property that "belongs" to the Temple "belongs" to each of the monks and nuns. Under the Temple's religious doctrine, funds are held communally but are used for individual personal expenses; a monastic who incurs personal expenses may receive a payment for the expense from a Temple account, but this personal expense is not thereby converted into a Temple or "corporate"

expenditure. Ms. Hsia argues that because the entire premise of the indictment is that monks and nuns acted as "conduits" for the Temple, the indictment necessarily relies on a notion of property that fundamentally is opposed to the religious doctrines of Humanistic Buddhism espoused by members of the Temple. She therefore contends that the indictment must be dismissed because it violates the First Amendment right to free exercise of religion. Alternatively, she has requested an evidentiary hearing on the issue of Buddhist beliefs and particularly the beliefs and practices of members of the Hsi Lai Temple.

The government first contends that Ms. Hsia has no standing to assert a free exercise defense because any such First Amendment right that might be implicated in this case belongs to the Temple and its monastics rather than to Ms. Hsia. Ms. Hsia argues that she meets the requirements for third party standing, and the Court agrees.

A criminal defendant has standing to raise the constitutional rights of a third party provided that (1) the defendant has suffered an "injury-in-fact" giving her a concrete interest in the outcome of the issue; (2) the defendant has a close relationship to the third party; and (3) there is some hindrance to the third party's ability to protect its own interests. See Campbell v. Louisiana, 118 S.Ct. 1419, 1422-23 (1998); Powers v. Ohio, 499 U.S. 400, 410-11 (1991). First, Ms. Hsia has suffered a cognizable injury from the alleged violation of constitutional rights in this case. If the government's theory of property truly infringes on the religious rights of the Temple and its monastics, Ms. Hsia's guilt or innocence may well turn on whether she can assert the free exercise right. Unlike a case in which a criminal defendant is trying to assert the rights of a third party to suppress illegally obtained evidence, it is not clear that the indictment in this case can stand without the government's

notion of property that allegedly violates the right to free exercise. Second, Ms. Hsia has a close relationship to the Temple and its monastics. Not only is she a member of the Buddhist community, the Temple is an unindicted co-conspirator. She and the Temple therefore have "a common interest" in the religious practices of the Temple and in asserting First Amendment free exercise interests in response to the indictment, and she has "an incentive to serve as an effective advocate" on these issues. Campbell v. Louisiana,118 S.Ct. at 1423. Finally, although the Temple is an unindicted coconspirator, there is no affirmative process by which the Temple can challenge the government's theory of property unless and until it is indicted.

On the merits of Ms. Hsia's First Amendment argument, the government asserts that the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), alters the analysis of Ms. Hsia's claim because the Supreme Court in Smith held that in most circumstances, the right of free exercise is not a defense against the application of an otherwise valid and neutral law of general applicability. Id. at 879, 884-85. The Court also recognized, however, that the First Amendment may bar application of such a law to a religiously motivated action in cases where the free exercise claim arises "in conjunction with other constitutional protections, such as freedom of speech and of the press." Id. at 881. See also E.E.O.C. v. Catholic University of America, 83 F.3d 455, 467 (D.C. Cir. 1996).

In this case, Ms. Hsia's free exercise claim arises in conjunction with the First Amendment protection of political expression and association, see supra at 9-12, and is thus one of those "hybrid situation[s]" involving both free exercise and free speech that the Court catalogued in Smith. Employment Division v. Smith, 494 U.S. at 881-82. The Court therefore concludes that Smith does not prevent Ms. Hsia from asserting

her free exercise claim as a defense to the application of the generally applicable laws she is charged with violating. See Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940).[13] The question is whether that defense may or must be resolved on a motion to dismiss or whether it is more properly a factual matter for resolution by the jury at trial.

While the government does not dispute that the Temple has the right to maintain a "community treasury" from which its monks and nuns withdraw funds, it argues that Ms. Hsia's First Amendment argument raises factual issues that must await resolution by the jury at trial. Relying on United States v. Ballard, 322 U.S. 78 (1944), Ms. Hsia counters that the indictment must be dismissed before trial because the jury cannot consider the truth or falsity of a religious belief.

The import of Ballard is clear: In the United States of America, there is no state religion, "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." United States v. Ballard, 322 U.S. at 86 (quoting Watson v. Jones, 13 Wall 679, 728 (1871)). No particular religion may be established by law, nor may the exercise of any be prohibited. U.S.CONST., amend. I. And "[i]f one could be sent to jail because a jury in a hostile environment found [particular religious] teachings false, little

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[13] Ms. Hsia also argues that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, bars the government from pursuing this indictment. RFRA was an attempt by Congress to restore the protections of the First Amendment with respect to religion that had been recognized prior to the Supreme Court's decision in Smith. Because the Court has found that Smith does not limit Ms. Hsia's right to raise a defense based on her religious beliefs, RFRA does not afford any additional protection, and Ms. Hsia's RFRA claim fails for the same reason that her First Amendment free exercise claim fails.

indeed would be left of religious freedom." United States v. Ballard, 322 U.S. at 87. Accordingly, when jurors in a criminal trial are asked to decide whether they accept or reject a particular religious doctrine -- what Justice Douglas called deciding upon the "truth or falsity" of a religious belief --"they enter a forbidden domain." Id. See In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 987-88 (3d Cir. 1985), *cert denied,* 474 U.S. 1055 (1986).

By contrast, juries routinely are asked to determine whether a person sincerely holds a religious belief and whether she acted out of or was motivated by that belief or for some other reason. See United States v. Rasheed, 663 F.2d 843, 847-48 (9th Cir.), *cert. denied,* 454 U.S. 1157 (1982). "The First Amendment does not protect fraudulent activity performed in the name of religion," and a properly instructed jury may consider the intent or motivation of a person who invokes religious beliefs as a justification for her actions. Id. Indeed, while the Supreme Court in Ballard found that the validity of the defendants' religious beliefs was of no concern of the jury, it upheld a jury instruction that the jury could convict if it found that the defendants did not in good faith believe their representations about spiritual healing but made those representations for the purpose of obtaining money. United States v. Ballard, 322 U.S. at 84. See United States v. Seeger, 380 U.S. 163, 184 ("while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case").

In this case, Ms. Hsia has presented evidence that Buddhists from the Temple believe that personally possessing property gives rise to greed, which obstructs a person's spiritual development. Def 's Motion No. 9, Exh. 5 at 32. The Temple's monks and nuns therefore are encouraged to avoid managing personal accounts and instead to deposit all personal

wealth into a community treasury and to withdraw funds only as needed for personal expenses. It would be inappropriate for the jury to consider whether that belief is true or false, acceptable or unacceptable. For instance, the jury may not consider whether it in fact is true that personal wealth obstructs spiritual development or whether it is reasonable to hold such beliefs. The jury may and in fact must consider, however, Ms. Hsia's motivation and the extent to which her conduct was motivated by the asserted religious beliefs. See United States v. Rasheed, 663 F.2d at 848.

The government represents that it expects to prove at trial that "the reimbursement money actually belonged to the Temple and that the Temple and the defendant understood that the Temple was the true (and illegal) source of the funds," Gov't Memorandum in Opposition to Def's Pretrial Motions 1-11, 13 & 14 at 46, and that the Temple reimbursed individuals for reasons other than religious doctrine. Gov't Response to Def's Supplement to Motion to Dismiss at 4. It argues that the defendant's claim that all Temple monies are communal is a factual question and a matter of defense for the jury to consider at trial. Transcript at 45.[14] If the jury finds that Ms. Hsia and the Temple orchestrated the alleged scheme with the intent to defraud the United States and with the intent to cause false statements to be made to the FEC, then it may find Ms. Hsia guilty. On the other hand, if the jury finds that

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[14] The government also argues that defendant must establish (either on this motion or in defense at trial) "that it is an element of the religion that monastics must make political contributions, and that the Temple must reimburse monastics for such contributions." Gov't Response to Def.'s Supplement to Motion to Dismiss at 4. Quite obviously, that is *not* the issue for this Court or for the jury. The issues of fact relate to whether there is a communal pot from which personal expenses come -- whether they be for food, clothing or political contributions.

Ms. Hsia's conduct in this case was motivated by a good faith belief that the Temple's property belonged to the monks and nuns, then the jury cannot find her guilty, regardless of whether it thinks that her belief or the beliefs of the Buddhists are reasonable or "true." These and similar questions of fact relating to intent or motive (as opposed to truth of falsity of a religious belief) are jury questions to be decided at trial. Accordingly, there is no need for an evidentiary hearing now. Nor is Ms. Hsia entitled to dismissal of the indictment.

III. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT BECAUSE IT SELECTIVELY PROSECUTES MARIA HSIA

Ms. Hsia claims that the Campaign Finance Task Force selected her for prosecution because she is Asian, in violation of the equal protection guarantee of the Due Process Clause of the Fifth Amendment. Ms. Hsia contends that the government's impermissible motivation requires dismissal of the indictment or, at the very least, limited discovery to perfect her ability to demonstrate discriminatory intent and effect. The Court concludes that Ms. Hsia. has failed to present "clear evidence" that the decision to prosecute her had a discriminatory effect and was motivated by a discriminatory purpose, and she therefore is not entitled to dismissal of the indictment. See United States v. Armstrong, 517 U.S. 456, 464 (1996); United States v. Magana, 127 F.3d 1, 8-9 (1st Cir. 1997). While she has provided "some evidence tending to show" that the prosecutorial decision both was motivated by a discriminatory purpose and had a discriminatory effect, the government in response has provided evidence that it has not discriminated against her or acted from impermissible motives. In view of the sensitive nature of the discovery sought, the fact that the government has proffered a legitimate explanation to rebut Ms. Hsia's showing of discriminatory intent and the fact that Ms. Hsia's showing of discriminatory

effect is not particularly strong, the Court will exercise its discretion to deny Ms. Hsia's request for limited discovery. See United States v. Armstrong, 517 U.S. at 469.

A defendant bringing a selective prosecution claim carries a very heavy burden because there is a strong presumption that prosecutors are properly discharging their official duties. See United States v. Armstrong, 517 U.S. at 464. So long as the prosecutor has "probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." Bordenkircher v. Hayes, 434 U.S. at 364; see United States v. Wayte, 470 U.S. 598, 607 (1985) (prosecutor in better position than court to assess "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan"). The reluctance of courts to look behind a prosecutor's charging decision rests in part on separation of powers principles and in part on a recognition that the public prosecutor, constrained by the ethics of the legal profession and the oath to uphold the Constitution and laws of the United States, will act properly and exercise reasoned discretion. In the case of a Justice Department prosecutor, the courts' reluctance to intervene is also based on a level of judicial confidence in the systems of checks and balances and review at various levels of the Department of Justice and its hierarchy of full-time, experienced professional prosecutors, up to and including the Attorney General. Judicial deference has been accorded to the Executive in these matters precisely because it has been earned, that is, because discretion traditionally has been exercised. It is, of course, quintessentially the responsibility of the judiciary to deal -- and to deal firmly -- with prosecutorial overreaching or abuse of power.

Prosecutorial discretion is not unlimited, and its exercise is subject to constitutional constraints. United States v. Batchelder, 442 U.S. at 125. A prosecutor may make legitimate choices but may not select to prosecute an individual on the basis of race, religion or other arbitrary classifications. United States v. Armstrong, 517 U.S. at 464 (*citing* Oyler v. Boles, 368 U.S. 448 (1962)). Thus, even where "the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

In order to prevail on a selective prosecution claim and to obtain dismissal of an indictment, a defendant must clearly establish (1) that the prosecutorial decision was motivated by a discriminatory purpose or intent, and (2) that it had a discriminatory effect. United States v. Armstrong, 517 U.S. at 464. Discriminatory purpose may be established either with direct evidence of intent or with "evidence concerning the unequal application of the law, statistical disparities and other indirect evidence of intent." Branch Ministries v. Richardson, 970 F.Supp. 11, 17 (D.D.C. 1997); see King v. Palmer 778 F.2d 878, 881 (D.C. Cir. 1985). A showing of discriminatory effect requires the defendant to demonstrate that similarly situated persons of other races, religions, national origin or ethnicity have not been prosecuted. For obvious reasons, the selective prosecution standard is a "demanding one," and the defendant must present "clear evidence" of both discriminatory intent and effect to establish her claim. See United States v. Armstrong, 517 U.S. at 463, 465.

Similarly, because granting discovery with respect to a selective prosecution claim may require an examination of investigative files or secret grand jury materials, including information relating to ongoing investigations in other cases, and "will divert prosecutors' resources and may disclose the Government's prosecutorial strategy . . . [there is] a correspondingly rigorous standard for discovery in aid of such a claim." United States v. Armstrong, 517 U.S. at 468. Absent a direct admission of discriminatory intent or purpose, a defendant seeking to obtain discovery must provide "some evidence tending to show the existence" of each of the two essential elements of her selective prosecution claim: (1) that her prosecution was improperly motivated, and (2) that she was singled out for prosecution from among others similarly situated. See United States v. Armstrong, 517 U.S. at 469; United States v. Al Jibori, 90 F.3d 22, 25 (2d Cir. 1996); Branch Ministries v. Richardson, 970 F.Supp. at 16. To make out such a "colorable claim" sufficient to warrant discovery, the defendant must provide something more than mere speculation or "personal conclusions based on anecdotal evidence," but the standard necessarily is lower than the "clear evidence" standard required for dismissal of the indictment. See United States v. Armstrong, 517 U.S. at 470.

Until 1996, the Public Integrity Section of the Criminal Division of the Department of Justice had primary responsibility for investigating and prosecuting criminal violations of FECA and campaign finance violations generally. In November 1996, however, the Attorney General created the Campaign Financing Task Force to investigate and prosecute campaign finance abuses stemming from the 1996 election cycle. Since its creation, the Task Force has initiated prosecutions against eleven individuals, including Ms. Hsia. Of those eleven individuals, nine are Asian or Asian

American.[15] Ms. Hsia claims that the Task Force has impermissibly selected her for prosecution on the basis of her Asian ancestry.[16]

The government does not dispute that *nine* out of a total of *eleven* or 82% of the individuals that the Task Force has prosecuted are Asian or Asian-American. Moreover, the two non-Asians have been charged only with misdemeanors, while

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[15] The nine Asians or Asian Americans are: Maria Hsia, Charlie Trie, Antonio Pan, Johnny Chung, Pauline Kanchanalak, Duangnet "Georgie" Kronenberg, Nora Lum, Gene Lum and Trisha Lum. The two individuals who are not of Asian descent are Michael Brown (an African American) and Howard Glicken (a Caucasian American). Mr. Brown, Mr. Glicken, and Ms. Trisha Lum have pleaded guilty to misdemeanor violations of FECA. Mr. Gene Lum and Ms. Nora Lum have each pleaded guilty to a felony, conspiracy under 18 U.S.C. § 371. Mr. Chung has pleaded guilty to a variety of felony charges. The remaining five defendants have been indicted for multiple felonies and the cases are pending. Ms. Hsia has been indicted on six felony counts.

[16] Ms. Hsia contends that the Campaign Financing Task Force, rather than the Department of Justice as a whole, is the relevant prosecutorial entity for selective prosecution analysis, and the government agrees. Gov't Memorandum in Opposition to Def's Motions at 73. See McClesky v. Kemp, 481 U.S. 279, 292 (1987); United States v. Gomez-Lopez, 62 F.3d 304, 306 (9th Cir. 1995).

The government has represented that the primary focus of the Task Force is "on allegations of wrongdoing in connection with the 1996 federal election cycle," Gov't Supplemental Response on Selective Prosecution Issue at 1, and the Court therefore will use that as the defining scope of the Task Force's prosecution authority for purposes of determining whether there are similarly situated persons that the Task Force could have prosecuted but chose not to prosecute. To the extent, however, that the Task Force also has made decisions to prosecute people such as Mr. Glicken, Mr. Brown and the Lums for violations outside of the 1996 federal election cycle, information about those prosecutions is relevant to the selective prosecution analysis because prosecutorial judgments made by the same decisionmakers are relevant to a consideration of their purpose or intent in this case.

eight of the nine Asians and Asian Americans face or have faced felony charges. Because the Task Force to this point has returned only eleven indictments, the sample available to Ms. Hsia is quite small. Nevertheless, the statistical disparity could, if left unexplained, suggest a discriminatory purpose or motive.

In an attempt to explain why nine of the eleven cases brought by the Task Force have involved Asians or Asian Americans, the government stated at oral argument:

> Well, Your Honor, I think that everyone knows the reason why this whole Task Force developed in part because of the allegations that arose in October of 1996 concerning John Huang's activities and the activities on the West Coast and the allegations that surfaced.
>
> As a matter of fact, one of the first, if not the first allegation involved the Hsi Lai Temple and the potential illegal contributions that flowed from various events at the Temple.
>
> So, Your Honor, initially the government was pointed in that direction by the press and by things that came out concerning the community out in the Los Angeles area, specifically John Huang, and among the first people who it was alleged had engaged in potentially illegal conduct were Charlie Trie, Maria Hsia, Pauline Kanchanalak, the other people who were indicted.
>
> . . . [A]nd the Government received some of its information from those sources . . . through the press and others.

Transcript at 59-61. The government also acknowledged that some of the press reports on which it relied related to testimony and statements made at congressional hearings. Id. at 61. The government maintains, however, that its charging decisions have not been influenced by the press or by Congress.

At the time of argument on this motion, it appeared from the public record that the only connections between Mr. Huang, Mr. Trie, Ms. Hsia and Ms. Kanchanalak were (1) that they are Asian or Asian American, and (2) that they were indicted by the Task Force grand jury. There was no suggestion that the four people mentioned acted in concert or that the violations they allegedly committed were connected or that all of them were connected to "the West Coast" and to John Huang. If the only commonality between the four was their Asian ancestry, the government's general statements at argument would be insufficient to explain away the statistics and might leave a colorable basis for Ms. Hsia's claim that the prosecutors' decision to prosecute her for felonies was motivated by discriminatory intent or motive. See United States v. Al Jibori, 90 F.3d at 26.

Since the argument, however, the government has provided a bill of particulars indicating that there was indeed a connection between Ms. Hsia, her California-based co-conspirators and Mr. Huang and that they did act in concert. It has indicated that it intends to prove at trial that Ms. Hsia met John Huang at the Hsi Lai Temple and that one of the monastics provided checks either to the defendant or to Mr. Huang. See Bill of Particulars at 6, 18-19. Furthermore, recent press accounts indicate that a central feature of the case against Pauline Kanchanalak and her co-defendant, Duangnet "Georgie" Kronenberg, was a Democratic- sponsored coffee with the President that John Huang orchestrated and that Ms.

Kanchanalak and Ms. Kronenberg attended with Mr. Huang on June 18, 1996. See Robert L. Jackson and Ronald J. Ostrow, *Primary Target Charged in Probe of Clinton Donors,* L.A. Times, July 14, 1998, at Al. See also United States v. Kanchanalak, Criminal No. 98-0241 (D.D.C.), Indictment at ¶ 51. Thus, the government has provided evidence of more of a connection between Mr. Huang and Ms. Hsia, Ms. Kanchanalak and Ms. Kronenberg than originally appeared and has demonstrated that the Huang and West Coast connections have some factual basis. Its explanation of why at least four of the nine Asians or Asian Americans have been indicted provides a legitimate non- discriminatory motive for the prosecutions.[17]

While the government has offered an explanation to rebut Ms. Hsia's statistical showing of discriminatory intent or motive, intent is difficult to establish without some discovery. See Branch Ministries v. Richardson, 970 F.Supp. at 17. Accordingly, if her evidence of discriminatory effect were stronger, Ms. Hsia probably would have a sufficient showing to warrant some discovery. Ms. Hsia's showing of discriminatory effect, however, is quite fragile.[18]

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[17] The government also has represented that the prosecution of Nora Lum, Gene Lum and Tricia Lum, three of the Asians prosecuted by the Task Force, "while within the purview of the Task Force, was initiated by the independent counsel investigating former Cabinet member Ronald Brown, and was brought to the Task Force by an attorney who formerly worked for that independent counsel." Gov't Supplemental Response on Selective Prosecution Issue at 1.

[18] If the Court were inclined to grant discovery, it would at the very least require disclosure of any documents in the possession of the Task Force that specifically refer to Asian ancestry as a factor to be considered in investigating and prosecuting campaign finance violations or that in any way indicate that the Task Force should focus its attention on Asians or Asian Americans, including any information respecting pressure from the Congress.

In order to establish discriminatory effect, Ms. Hsia must provide evidence that there are individuals or entities who (1) are not Asian or Asian-American, (2) committed similar offenses in connection with the 1996 federal election cycle, and (3) have not been prosecuted by the Task Force. See Attorney General v. The Irish People, Inc., 684 F.2d 928, 946 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983). The government contends that Ms. Hsia has pointed to no similarly situated persons who have not been prosecuted by the Task Force, but that is not so. Ms. Hsia initially pointed to at least 13 and perhaps as many as 39 instances in which she maintains that similarly situated non-Asian individuals and entities were not prosecuted. Def's Motion to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia at 4-10. While on closer analysis it appears that only two of the instances identified in her initial filing, General Cigar Company, Inc. ("GCC") and Elgin Builders, Inc., may have been similarly situated, the alleged violations in those two instances do bear similarities to the alleged violations in Ms. Hsia's case.

In both cases, the FEC investigated concealment violations committed during the 1996 federal election cycle and found reason to believe that those persons and entities had violated the law. See Def's Motion 10, Exh. 4-5, 21. In both cases, the laws that the FEC found reason to believe the individuals had violated are the same laws that form the basis for the charges in Ms. Hsia's case: the prohibition against contributions in the name of another and the prohibition against corporate contributions. To date, however, none of the individuals or entities involved in those two schemes has been prosecuted by the Task Force.[19]

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[19] In the GCC case, the General Counsel of the FEC recommended that the FEC "find reason to believe" that GCC and a number of its executives "knowingly and willfully" violated FECA's corporate

In a recent filing, Ms. Hsia also argues that the Task Force has made a decision not to prosecute Haley Barbour (a Caucasian American), the former Chairman of the Republican National Committee ("RNC"), with respect to foreign contributions and possibly false statements made to the FEC in RNC reports. See Supplement to Motion to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia at 2-3. The allegations against Mr. Barbour and the allegations in the indictment against Ms. Hsia undoubtedly both involve

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contribution prohibition, 2 U.S.C. § 441b, and FECA's prohibition of contributions in the name of another, 2 U.S.C. § 441f. The respondents entered into the FEC's conciliation process and ultimately agreed to pay an $80,000 fine. Def's Motion No. 10, Exh. 4. It appears that none of the corporate officials implicated in the scheme was Asian or Asian American, and none was prosecuted by the Task Force despite the fact that the FEC found reason to believe that the company and its officials had violated the same provisions of FECA that form the basis for the charges in Ms. Hsia's case.

In the Elgin Builders case, the FEC investigated allegations that Elgin Builders funneled money into the campaign of the Clinton/Gore Primary Committee, Inc. through its employees. See Def's Motion No. 10, Exh. 21. As with the scheme at issue in GCC, the FEC found reason to believe that Elgin Builders and one of its officials "knowingly and willfully" violated FECA's corporate contribution prohibition, 2 U.S.C. § 441b, and FECA's prohibition of contributions in the name of another, 2 U.S.C. § 441f. See id. at 9. The race and national origin of the corporate official who allegedly committed the violation is unclear from his name. He apparently has not been prosecuted.

Ms. Hsia's case allegedly involved $125,000 in conduit contributions, while GCC involved only $11,000 and Elgin Builders only $4,000 -- facts that arguably distinguish the cases. In GCC, however, it appears from the General Counsel's Report that there may have been additional contributions that would have increased the amount at issue. Moreover, it appears that there were aggravating circumstances in the GCC case such as the time period over which the scheme allegedly occurred and the fact that there were a number of contributions at issue that might have made this a case similar to Ms. Hsia's. Def's Motion No.10, Exh. 5 at 3.

campaign finance improprieties, but the alleged schemes in the two situations appear to be different. Ms. Hsia characterizes Mr. Barbour's offense as one in which the Republican National Committee "received foreign money in the form of a 'loan' from a related organization." Id. at 2. While Ms. Hsia may be correct that *"no-one* should be held to a higher standard than an individual who heads a national political party," id. at 2 (emphasis in original), her characterization of Mr. Barbour's situation, even if true, raises additional complexities not present in her case. The two cases therefore are not similar.

The Court is left with only two arguably similar cases to establish discriminatory effect. If Ms. Hsia had provided stronger evidence of discriminatory intent or if the government had not proffered a legitimate explanation of the glaring statistics, the showing of discriminatory effect may have constituted a "colorable basis" sufficient to warrant discovery. Cf. United States v. Al Jibori, 90 F.3d at 25. Under the circumstances, however, the Court cannot conclude that Ms. Hsia has met the rigorous standard set forth in Armstrong. In view of the facts alleged in the bill of particulars and in the Kanchanalak/Kronenberg indictment, as well as those contained in an ex parte, in camera submission filed by the government and accepted for consideration by the Court, the Court concludes that discovery into the prosecutorial process is not warranted.[20]

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[20] Finally, it is worth noting that the facts proffered by Ms. Hsia necessarily are based on incomplete information and are premised on an assumption that none of the cases she has cited (or perhaps others) is presently being investigated by the Task Force. The cases indicted by the Task Force grand jury to date may be but the tip of a larger iceberg and the public snapshot of what ultimately may be a much wider panorama of campaign finance prosecutions. To the extent that an investigation is ongoing, the Task Force has not yet "chosen" not to prosecute those individuals or entities it is investigating, and requiring the government to

IV. DEFENDANT'S MOTION TO DISMISS CONSPIRACY COUNT FOR FAILURE TO STATE AN OFFENSE

The indictment alleges in Count 1 that Ms. Hsia "knowingly and willfully" conspired to defraud the United States, by impairing, obstructing, impeding, and defeating the lawful functions and duties of the FEC and the INS in violation of 18 U.S.C. § 371. Indictment at 4. Ms. Hsia has moved to dismiss the conspiracy count for failure to state an offense or, in the alternative, to strike the Immigration and Naturalization Service as an object of the conspiracy.

Ms. Hsia asserts that the conduct alleged in the indictment has only an attenuated connection to the FEC and virtually no connection to the INS and that the indictment does not allege that any function of the FEC or the INS was impaired by the alleged conduct. Ms. Hsia appears to be making the general argument that the offense of "conspiracy to defraud the United States" under 18 U.S.C. § 371 must be construed narrowly and that the connection between her conduct and the agencies is too attenuated to state a Section 371 offense. See Hammerschmidt v. United States, 265 U.S. 182 (1924). The Court disagrees.

The conspiracy count alleges that the FEC is an agency of the United States government "entrusted with the responsibility of enforcing the reporting requirements of the FECA . . . and responsible for making available to the public certain information about the amounts and sources of political contributions to federal candidates and their political committees," and that the INS is an agency of the United States government entrusted with the responsibility of

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disclose information about them would pose a significant threat to the government's ability later to do so. On this record, the Court declines to order discovery.

enforcing the Immigration and Nationality Act, including a provision applying to religious workers who can obtain special visas to enter or remain in the United States "for the purpose of working for a bona fide nonprofit religious organization." Indictment at ¶¶ 6-8. The indictment next alleges that Ms. Hsia and other named and unnamed co-conspirators entered into an agreement to prevent the INS and the FEC from learning that IBPS, a corporation, had unlawfully made political contributions. Finally, the indictment alleges a series of overt acts taken by Ms. Hsia and her alleged co-conspirators to prevent the INS and the FEC from learning about the illegal contributions, including the implementation of an elaborate conduit scheme to conceal from the FEC the fact that IBPS was making political contributions and the submission of a document to the INS indicating that "IBPS had not participated in any political campaign." Indictment at ¶¶ 40(d), (e), (k), (l).

While Ms. Hsia is correct that in order to establish a conspiracy to defraud the United States the government must prove that the object of the conspiracy was to obstruct a specific function of a government agency, see United States v. Haga, 821 F.2d 1036, 1041 (5th Cir. 1987), the indictment in this case clearly alleges that the object of the conspiracy was to obstruct specific functions of specific agencies. With respect to the FEC object of the conspiracy, the indictment specifically states that one of the functions of the FEC is to enforce the various provisions of FECA, including its prohibition of corporate and conduit contributions. The object of the alleged conspiracy was to prevent the FEC from learning that IBPS in fact was violating these provisions of FECA. Indictment at ¶ 11.

With respect to the INS object of the conspiracy, the indictment specifies that one of the functions of the INS is to enforce the provision of the Immigration and Nationality Act

addressing the "religious worker" program. The indictment alleges that it was an object of the conspiracy to prevent the INS from learning that IBPS gave political contributions, a fact which may have jeopardized IBPS' eligibility for the religious worker program. Indictment at ¶ 12. The indictment therefore specifically alleges a conspiracy to impair and impede specific functions of the FEC and the INS. The government, of course, will have the burden of proving the existence of a conspiratorial agreement and the obstruction of a function of the FEC or the INS at trial, but the indictment sufficiently alleges a Section 371 conspiracy.[21]

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[21] Ms. Hsia also argues that because the conduct alleged in the indictment is proscribed by FECA, the government is required to charge her with conspiracy to violate FECA, a misdemeanor, rather than with conspiracy to defraud the United States. She relies on the Sixth Circuit's opinion in United States v. Minarik 875 F.2d 1186, 1194 (6th Cir. 1989) (conspiracy whose objective is "covered by a specific offense defined by Congress" must be prosecuted "exclusively under the offense clause" of Section 371 rather than under the defraud clause). The Court does not find this argument persuasive.

While the language of Minarik was very broad, the Sixth Circuit has subsequently narrowed the holding in Minarik quite significantly. See United States v. Khalife, 106 F.3d 1300, 1304-06 (6th Cir. 1997), *cert. denied,* 118 S.Ct. 685 (1998); United States v. Kraig 99 F.3d 1361, 1367-68 (6th Cir. 1996); United States v. Sturman, 951 F.2d 1466, 1473-74 (6th Cir. 1991), *cert. denied,* 504 U.S. 985 (1992); United States v. Mohney, 949 F.2d 899, 901-03 (6th Cir. 1991), *cert. denied,* 504 U.S. 910 (1992). Minarik also has been limited to the peculiar factual circumstances presented there: (1) the government's theory of conspiracy shifted throughout the case, a problem that was magnified by the fact that the indictment did not allege the specific functions of the agency that allegedly were impeded; (2) the defendants' alleged criminal conduct consisted of one limited act of concealment, a fact that made the breadth of the alleged conspiracy incommensurate with the Minarik court's conception of a general conspiracy to defraud; and (3) the duties at issue were highly technical. See United States v. Khalife 106 F.3d at 1304-06.

As for Ms. Hsia's alternative request that the Court strike the INS as an object of the conspiracy, the Court's initial concerns about whether there was any evidence of a connection between Ms. Hsia's activities and the lawful functions of the INS, see Opinion of August 13, 1998 at 30-31, have been allayed by the government's bill of particulars. See Bill of Particulars at 9-13 ("From 1993 through 1996, the defendant and IBPS concealed that the Temple was the true source of funds for contributions to local, state and federal candidates, and provided false and misleading documentation to the INS in connection with I-129 and 1-360 petitions for persons to work at the Hsi Lai Temple . . . Based upon the false and misleading documentation in the applications, the INS took no action to investigate the Temple's activities or tax status, and generally approved the applications with dispatch"). The INS therefore will not be stricken as an object of the conspiracy.

V. MOTIONS TO DISMISS FALSE STATEMENTS COUNTS

Counts 2-6 of the indictment charge Ms. Hsia with having caused various political committees to make false statements to the FEC in violation of 18 U.S.C. §§ 1001 and 2(b). Section 1001 provides, in relevant part, that "whosoever, in any matter within the jurisdiction of the executive,

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The same factual scenario is not presented in this case. The indictment charging Ms. Hsia with conspiracy identifies the specific functions of the agencies that allegedly were impaired or impeded. See supra at 37-38. Moreover, the conduct alleged in Ms. Hsia's indictment spans over a long period of time, implicates several provisions of FECA and impaired or impeded more than one governmental agency. While the government *could* have charged Ms. Hsia with conspiracy to violate FECA, the object of the conspiracy here clearly involved much more than a conspiracy to violate FECA, and it was well within the government's discretion to choose to charge her under the defraud clause of Section 371.

legislative, or judicial branch of the Government of the United States, knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" shall be held criminally liable. 18 U.S.C. § 1001. Section 2(b) provides that "[w]hoever willfully *causes* an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2(b) (emphasis added).

All of the false statements counts allege that Ms. Hsia "knowingly and willfully caused the submission of a material false statement to the FEC" by causing a federal political committee to file a report with the FEC that listed certain individuals as "contributors" when Ms. Hsia "knew, in truth and in fact, [that] the individuals named in the report were not the actual contributors." See, e.g., Indictment at ¶ 43. Each of the five counts alleges that Ms. Hsia solicited the contributions that led to the making of false statements by the political committees; Count 6 also alleges that in one case Ms. Hsia acted as one of the conduits. Indictment at ¶ 54. The indictment does not identify the "actual" contributor in Counts 2 and 3, but it alleges that the "actual" contributor in Counts 4-6 was the Hsi Lai Temple. The government has specified that the "false statements" are the names of the "contributors" listed by the political committees in their reports to the FEC and that the political committees took the names from the signature line of the checks submitted to them. The falsity, according to the government's theory, stems from the fact that the names listed on the reports are not the names of the "actual" contributors but instead are the names of the "conduits" who signed the checks.

To recite the bare factual allegations of the indictment and the words of Sections 1001 and 2(b), however, does not capture the Alice-in-Wonderland-like maze of logical leaps and tangled inferences that are required in order to find that this indictment adequately alleges Section 1001 and 2(b) violations or to find that anyone in Ms. Hsia's position would be on notice that her alleged conduct violated these statutes. At every turn, one encounters another place where the government's theory defies logic and stretches almost beyond recognition the two criminal statutes on which it relies. Only by invoking the most highly technical and inventive reasoning does the indictment even arguably allege conduct that constitutes the essential elements of the offense: false statements, causation, and knowing and willful conduct. While inventive and clever applications of statutes may have their place in some legal settings, they have no place in an indictment charging someone with serious felonies for conduct that implicates several of the protections of the First Amendment and has such a tenuous relationship to the ultimate submission of a false statement to the FEC. The Court concludes that any finding that the conduct alleged in the indictment constitutes a false statements offense would require an impermissibly strained reading of Sections 1001 and 2(b). These counts therefore must be dismissed.[22]

One of the fundamental problems with the indictment is that it provides no details with respect to how the conduct alleged constitutes the essential elements of the offenses charged. Each of the essential elements is included only by virtue of the fact that the indictment faithfully recites the words of the statutes: Ms. Hsia "knowingly and willfully" "caused" the submission of "false statements" to the FEC.

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[22] In view of the Court's decision to dismiss Counts 2-6, it is unnecessary to address the arguments raised in Ms. Hsia's Motion No. 7, to Dismiss Counts 4 & 5 for Failure to State an Offense (Soft Money).

Generally, of course, it is sufficient for an indictment to charge the criminal offense in the words of the statute itself, provided that those words "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." Hamling v. United States, 418 U.S. 87, 117 (1974) (quoting United States v. Carll, 105 U.S. 611, 612 (1882)). The bare recitation of the statutory language, however, must also be "accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which [she] is charged." Id. Especially where "the statutory definition of an offense employs generic terms, it is not sufficient to charge the offense in the same terms employed by the statute; the indictment must 'descend to particulars.' " United States v. Sullivan, 919 F.2d 1403, 1411 (10th Cir. 1990) *(quoting* Russell v. United States, 369 U.S. 749, 765 (1962)). See also United States v. Salisbury, 983 F.2d 1369, 1375 (6th Cir. 1993).

This specificity requirement serves several purposes required by the Constitution and identified by the Supreme Court over a century ago. First, there is the "fair notice requirement that the indictment must furnish the defendant with "such a description of the charge" against her so that she is able to "make [her] defense." United States v. Cruikshank, 92 U.S. 542, 558 (1875). Second, the indictment must allege the conduct being charged with sufficient particularity that the defendant can raise her conviction or acquittal as a bar to future proceedings based on the same conduct. Hamling v. United States, 418 U.S. at 117. Finally, the indictment must be sufficiently detailed to "inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone." United States v. Cruikshank, 92 U.S. at 558.

In this case, it is not clear how the alleged conduct satisfies any of the essential elements of the two statutes that are invoked. The elements are so hopelessly entangled that it is impossible for either the Court or Ms. Hsia to determine precisely what conduct on her part has subjected her to prosecution on these charges. See United States v. Salisbury, 983 F.2d at 1375 (dismissing indictment because it "fails to adequately notify the defendant of the specific occurrences which constituted the charges against her"). For instance, because it is not at all clear from the indictment *whether* or *how* the statements are false, it is difficult to determine whether Ms. Hsia "caused" the false statements to be made by taking actions to mislead someone else into making affirmatively "false" statements or whether she "caused" the false statements by taking some action that was independent of the making of the statement and that made the statements false. Similarly, because the indictment does not clearly articulate what "act" by Ms. Hsia "caused" the false statements, it is difficult, if not impossible, to determine whether Ms. Hsia could have taken that act with the requisite knowledge to meet the "willful" intent element. Because the facts and circumstances alleged in the indictment appear to be only tangentially related to the offenses charged, the Court would have to read Sections 1001 and 2(b) very broadly indeed in order to find that the indictment serves the purposes constitutionally required of an indictment and that it adequately alleges violations of those statutes.

The problem is exacerbated by the fact that the indictment in this case charges conduct in an area that is permeated by First Amendment considerations, and overly broad or vague applications of the statutes invoked therefore are constitutionally impermissible. Because limitations on campaign contributions "operate in an area of the most fundamental First Amendment activities," Buckley v. Valeo, 424 U.S. at 14, any regulation of campaign contributions is

subject to close scrutiny to ensure that the government's interest in regulating that activity outweighs any burden on the First Amendment and to ensure that the legislation is carefully tailored and "closely drawn" to protect the First Amendment rights at issue. Id. at 25.[23] All the more so when criminal sanctions are involved and when a prosecutor goes outside the carefully structured regulatory scheme provided by Congress in devising a theory of prosecution.

The combination of the First Amendment interests at stake and the threat of a criminal prosecution necessitates a close examination of any indictment to ensure that the statutes utilized are neither overly vague nor overly broad in their language or in their application. See Buckley v. Valeo, 424 U.S. at 40-41 (close examination required where legislation imposes criminal penalties "in an area permeated by First Amendment interests"); id. at 76-77 (in analyzing independent expenditure disclosure provision, Court conducts First Amendment vagueness analysis, noting that "the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights"); see

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[23] Admittedly, there is some disagreement among the circuits concerning the precise level of protection afforded to campaign contributions. Compare Akins v. Federal Election Commission, 101 F.3d 731, 741 (D.C. Cir. 1996) *(en banc), vacated on other grounds,* 118 S.Ct. 1777 (1998) (campaign contributions entitled to less First Amendment protection than campaign *expenditures,* and regulation of campaign contributions therefore merits less exacting scrutiny than regulation of campaign expenditures) with Russell v. Burris, 146 F.3d 563, 567 (8th Cir. 1998) ("Government attempts to limit campaign contributions . . . are subject to the closest scrutiny . . . a significant interference with protected rights of political association may be sustained only when the state demonstrates a compelling interest and means closely drawn to avoid unnecessary abridgement of associational freedom") (internal citations and quotations omitted).

also Grayned v. Rockford, 408 U.S. 104 (1972) (even a "clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct"). The due process doctrines of vagueness and overbreadth together guard against "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of the sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963).[24]

The doctrine of vagueness incorporates notions of fair notice and fair warning. Smith v. Goguen, 415 U.S. 566, 572 (1974). At its most fundamental, it operates to ensure that "no [woman] shall be held criminally responsible for conduct which [she] could not reasonably understand to be proscribed," Buckley v. Valeo, 424 U.S. at 77 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)), and "due process bars courts from applying a novel [or strained] construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." United States v. Lanier , 117 S.Ct. 1219, 1225 (1997). Where a statute reaches expression protected by the First Amendment, "the doctrine demands a greater degree

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[24] While the Court in Buckley ultimately upheld the *facial* constitutionality of the carefully tailored contribution limits and disclosure provisions of FECA, it did so only after conducting a thorough analysis of those provisions to ensure that they did not unduly infringe on the First Amendment rights at issue. It would be peculiar indeed if the application of criminal statutes that are much broader than FECA to the same type of conduct at issue in Buckley were not subject to at least the same level of scrutiny to ensure that First Amendment interests were not being unduly burdened.

of specificity than in other contexts." Smith v. Goguen, 415 U.S. at 573.[25]

The overbreadth doctrine is aimed at laws that are drafted so broadly that they sweep within their scope both expression that is protected by the First Amendment and unprotected expression or conduct. The doctrine is "predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.' " New York v. Ferber, 458 U.S. 747, 768 (1982) *(quoting* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980)). Because the vice of an overly broad statute is the risk that it will encompass both protected and unprotected expression or conduct, the Supreme Court has entertained attacks on such statutes "even though the conduct of the person making the attack is clearly

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[25] The "fair notice" protections of the vagueness doctrine are substantively different from the "fair notice" requirements for the sufficiency of an indictment discussed supra at 42-43. The fair notice requirement of the vagueness doctrine protects people from the application of *statutes* that are so vague that a reasonable person has no notice that her conduct might be proscribed by that statute. It is based on the Due Process Clause of the Fifth Amendment. See Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960). The requirement that an *indictment* must provide fair notice, by contrast, protects a defendant's right to an indictment that is detailed enough so that she can prepare a defense and be protected against double jeopardy. It is based on the Fifth Amendment grand jury indictment requirement, the Fifth Amendment's Double Jeopardy Clause and the Sixth Amendment's right to be informed of the nature and cause of the accusation. See Russell v. United States, 369 U.S. at 770-71; United States v. Cruikshank, 92 U.S. at 557-58.

unprotected and could be proscribed by a law drawn with the requisite specificity." New York v. Ferber , 458 U.S. at 769.[26]

There is no doubt that the conduct charged here could constitutionally be "proscribed by a [criminal] law drawn with the requisite specificity," New York v. Ferber, 458 U.S. at 769, and that the conduct in fact has been proscribed, at least in part, by Congress in FECA. See 2. U.S.C. § 441f. ("No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution. . . ."). Nor is there any doubt that Congress could conclude that felony rather than misdemeanor penalties are appropriate for the conduct it proscribes. See supra at 13 n.9. The issue in this case is whether charging the conduct described in the indictment under Sections 1001 and 2(b)

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[26] "[T]he doctrines of vagueness and overbreadth are not entirely distinct, and . . . the vices of vagueness and overbreadth are not wholly separable, in the area of the first amendment." Note, *The First Amendment Overbreadth* Doctrine, 83 Harv. L. Rev. 844, 873 (1970). The twin vices addressed by the doctrines of vagueness and overbreadth are the lack of fair warning and notice that someone's conduct may be subject to the criminal sanction and, because First Amendment protections are implicated, the threat that the overbroad language or application of a statute may chill protected speech by coercing people to leave protected utterances unspoken even when they are protected by the Constitution. Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L.Rev. at 76. The due process vices of facially vague statutes -- lack of fair warning and lack of adequate standards or guidance -- are the same vices that have led the Supreme Court to define the permissible reach of an overbroad statute more narrowly rather than to strike it down entirely. Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. at 872-75. See Boos v. Barry, 485 U.S. 312, 330 (1988); New York v. Ferber, 458 U.S. at 773; Buckley v. Valeo, 424 U.S. at 76-77; Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Cf. United States v. Nofziger, 878 F.2d 442, 453-54 (D.C. Cir.) (court of appeals reverses conviction by invoking third related doctrine, rule of lenity, to impose *mens rea* requirement on ambiguous statute in First Amendment area where statute itself did not clearly provide *mens rea), cert. denied,* 493 U.S. 1003 (1989).

would require a constitutionally overbroad or vague application of those statutes to this conduct.

The facial constitutionality of Sections 1001 and 2(b) is not at issue. They have been applied in a myriad of contexts and to a wide variety of conduct since the turn of the century, even in some cases where the First Amendment arguably was implicated. See, e.g., United States v. Rodgers, 466 U.S. 475, 484 (1984) (Section 1001 constitutional as applied to defendant who made false report to FBI and Secret Service); United States v. Daly, 756 F.2d 1076, 1081-82 (5th Cir.) (Sections 1001 and 2 constitutional as applied to scheme setting up churches to avoid income tax because jury considered only whether religious beliefs were truly held, not truth or falsity of beliefs), *cert. denied* 474 U.S. 1022 (1985). In this case, however, it requires an extraordinarily deft and clever reading of the false statements statute and Section 2(b) to discern the basic elements of the offense as applied to the conduct alleged: (1) a false statement, (2) a causal link between Ms. Hsia and the false statement, and (3) the requisite knowledge and intent. In the face of an indictment that so obscurely charges violations of Sections 1001 and 2(b), the due process doctrines of overbreadth and vagueness prevent this Court from stretching Sections 1001 and 2(b) so far beyond their generally accepted scope to reach the conduct alleged.

For starters, it is a battle to find the false statements in the indictment. A false statement is an essential element of a prosecution under 18 U.S.C. § 1001, and if the statement at issue is literally true a defendant cannot be convicted of violating Section 1001. See Bronston v. United States, 409 U.S. 352, 357-58 (1973) (unresponsive statement, even if intended to deceive, insufficient to sustain conviction of perjury); United States v. Milton, 8 F.3d 39, 45 (D.C. Cir. 1993), *cert. denied,* 513 U.S. 919 (1994) ("Falsity is an

essential element of the section 1001 offense").[27] The indictment in this case alleges that the "false statements" are the names of people who were "falsely identified" as contributors in the political committees' reports to the FEC. Ms. Hsia argues that the reports filed by the political committees make no factual assertions that the persons listed are the "true" or "actual" sources of the receipts, and she is quite right that the reports and the attached schedules do not expressly assert that the names listed are the "true sources" of the contributions.

The government contends, however, that those reports, when read in conjunction with the accompanying regulations and statutory provisions, imply an assertion that the listed names are the "true sources" of the contributions. This argument would make sense if a political committee treasurer or some other sophisticated committee official who actually made the "statement" to the FEC, knowing it was false and with the intent to deceive, had been indicted, either alone or as a co-conspirator with someone like Ms. Hsia. It is a stretch, however, to apply that reasoning here.

FECA requires political committees to exert best efforts to identify each person who makes a contribution to the

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[27] It is not entirely clear whether the literal truth of a statement is grounds for dismissal of an indictment or whether it operates only as a defense at trial. See, e.g., United States v. Milton, 8 F.3d at 45; United States v. Dale, 991 F.2d 819, 832-33 (D.C. Cir.), *cert. denied,* 510 U.S. 906 (1993). At least two courts, including this one, however, have suggested that literal truth is grounds for dismissal of the indictment. See United States v. Vesaas, 586 F.2d 101, 104 (8th Cir. 1978) ("the indictment is fatally defective in failing to set forth an offense under § 1001" when the statement is facially true); United States v. Clarridge, 811 F.Supp. 697, 712 (D.D.C. 1992) (Greene, J.) ("Bronston requires the court to dismiss the indictment only when it is plain that the government cannot prove that the defendant's statement was false").

political committee during the particular reporting period and whose aggregated contributions in that calendar year exceed $200 and to report that identification to the FEC. 2 U.S.C. §§ 432(i), 434(b)(3)(A). FEC regulations require "reporting committees" to exert "best efforts" to obtain the "identification" of each individual who contributes an amount in excess of $200 to the committee's federal ("hard money") account and to report that information. 11 C.F.R. § 104.8(a). The regulations specify that the "identification" shall include the individual's name, mailing address, occupation, the name of his or her employer, if any, and the date of receipt and amount of any such contribution. Id. In addition, the regulations provide that "[a]bsent evidence to the contrary, any contribution made by check, money order, or other written instrument shall be reported as a contribution that has been made by the last person signing the instrument prior to delivery to the candidate or committee." 11 C. F. R. § 104.8(c).

The itemization of the political committee's receipts generally is attached as a schedule to the summary report to the FEC of disbursements and receipts for the reporting period. The FEC has a specific form, Schedule A, on which the political committees are supposed to itemize receipts. Schedule A includes a line for the name of the committee, and then has boxes for listing various categories of information, including "Full Name, Mailing Address and ZIP Code," "Name of Employer," and "Amount of Each Receipt this Period." The itemization of receipts that contain the alleged false statements in this case appear to be simply computer print-outs with columns of names and addresses, employers/occupations, dates, amounts and, in some cases, year to date aggregate amounts. See Def's Motion No. 6, Exh. A-E.

While political committees must exert best efforts to identify individual contributors from whom they receive contributions, the contributors themselves have no duty to disclose any identifying information to the political committees, including even their name. Republican Nat'l Comm. v. Federal Election Comm'n, 76 F.3d 400, 406 (D.C. Cir. 1996) (contributor has no duty to reveal identity to FEC or political committees), *cert. denied,* 117 S.Ct. 682 (1997). The statute and the regulations therefore place no disclosure obligation on contributors and contain a "safe harbor" provision for political committees: If the political committee exerts its "best efforts" to obtain the relevant identifying information, including mailing a one-time request for such information to the contributor, id. at 403, 406, the report of the committee "shall be considered in compliance with" FECA. 2 U.S.C. § 432(i); 11 C.F.R. § 104.7. Thus, if the contributor does not respond to the committee's request, as is her right, the committee will have no information other than the check. It then may report the last name on the check to the FEC as the presumptive "contributor," and the committee is deemed to have met its obligations. See 11 C. F. R. § § 104.7, 104.8 (c).

Ms. Hsia argues that because the FEC's Schedule A never specifies that the political committee must list the name of the "true" or "actual" source of the contribution, the political committee's failure to list the "true" source of the contribution cannot constitute a "false statement." Ms. Hsia is correct that the political committees' reports and the attached schedules do not expressly assert that the names listed on it are the "true sources" of the contributions. Furthermore, although the definition of the word "contribution" in FECA occupies pages of the United States Code, the statute itself never explicitly defines contribution with reference to the "true

source" of the funds. See 2 U.S.C. § 431(8).[28] The government therefore is left to argue that a factual assertion that the name listed on the form is the true source of the contribution can be implied from FECA and the accompanying regulations.

There is at least a plausible argument that knowledgeable and sophisticated political committees or committee treasurers impliedly assert when they submit reports to the FEC that to the best of their knowledge the names listed on the reports are the "true sources" of the contributions. First, the regulation stating that "[a]bsent evidence to the contrary, any contribution made by check, money order, or other written instrument shall be reported as a contribution by the last person signing the instrument prior to delivery to the candidate or committee," 11 C.F.R. § 104.8(c), implies that *if there is* "evidence to the contrary" of which the political committee is aware, the committee may *not* report the contribution as having been made by the last person signing the instrument. The FEC regulation, if not the statute itself, therefore implies that the term "contributor" is not synonymous with the phrase "the last person signing the instrument" and that the political committee is supposed to identify the "true source" of a contribution if it knows the true source.

Second, FECA provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U. S. C. § 441f . Because the term "contribution" is used in this section of

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[28] Neither FECA nor FEC regulations define the word "contributor." At oral argument, the government stated that a contributor is "a person who makes a contribution." Transcript at 121.

FECA in conjunction with the person who is the actual source of the funds, rather than with the "name of another person," and because the same statutory definition of "contribution" applies in every section of FECA that uses the term (with one exception not relevant here), there is an implication that the term "contributor" means the true source, rather than the person whose name has been used.[29]

The provisions of FECA and the regulations on which the Court must rely to find false statements set forth the requirements for the filing of committee reports with the FEC in terms of the obligations and knowledge of the political committee treasurer, not someone like Ms. Hsia. When the treasurer signs his or her name to such a report, it is a relatively simple matter to determine the implied assertions that are being made. If the treasurer lists a name on the committee report that comes from the payor line on a check, he or she asserts that "best efforts" have been made to obtain complete identifying information – in other words, that the treasurer has *asked for* identifying information – and that the treasurer has no evidence that the listed name is not the actual contributor. Therefore if the treasurer knowingly lists a conduit as the true contributor, he or she could properly be

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[29] In addition, for purposes of determining whether a person has exceeded dollar limitations on contributions, FECA specifically provides that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient." 2 U.S. C. § 441 a(a)(8); see 11 C.F.R. § 110.6(a). This provision, however, was intended to address *legal* "conduit" contributions -- for instance when an individual contributes money to a national party that is earmarked for the campaign of a certain candidate -- and both the government and Ms. Hsia believe that the provision is wholly irrelevant in this case. See Transcript at 116-17, 125.

indicted for making a false statement under 18 U.S.C. § 1001. Similarly, if Ms. Hsia or a conduit contributor had knowingly conspired with the treasurer to have the treasurer intentionally misidentify the true contributor in a report to the FEC, there might be a legitimate charge of making a false statement or, more probably, of conspiracy to violate the false statements statute.[30]

The indictment here, however, does not allege that Ms. Hsia conspired with political committee treasurers to conceal from the FEC the identities of actual contributors and, absent any allegation of wrongful knowledge on the part of the political committees referred in the indictment, it is difficult to

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[30] If Ms. Hsia or one of her co-conspirators had responded to the request from a political committee for additional information and had affirmatively stated that the conduit was the true contributor, they probably could be charged with a violation of 18 U.S.C. § 1001 and 18 U.S.C. § 2(b), but under a slightly different theory. In that case, the response sent by Ms. Hsia or her co-conspirator would be an affirmative statement that the political committee essentially would directly relay to the FEC in its report. Assuming that Ms. Hsia knew that the political committee would relay her false statement to the FEC and that the other requirements for prosecution under Sections 1001 and 2(b) in the federal election context had been met, such a prosecution would be permissible. Cf. United States v. Hopkins, 916 F.2d at 214-15 (conviction under Sections 1001 and 2(b) upheld where defendant formed political action committee and directly submitted false information to committee treasurer for inclusion in committee report to FEC); United States v. Oakar, 924 F.Supp. at 242-43 (defendant, a former Congresswoman, properly charged with violating Sections 1001 and 2(b) where she made misrepresentations to campaign treasurer that resulted in falsities on financial disclosure reports).

In this case, however, Ms. Hsia and her co-conspirators remained silent and did not respond, as was their right. Republican Nat'l Comm. v. Federal Election Comm'n, 76 F.3d at 406. The only thing the conduits did was to sign blank checks in their own names at Ms. Hsia's request, and the government does not and cannot allege that the checks themselves contained false statements. See Williams v. United States, 458 U.S. 279, 284 (1982).

ascertain what, if any, implied assertions the political committees made in their reports and whether any of those assertions were "false." In this area of First Amendment protections, the very fact that it is necessary to draw so many inferences and assume such detailed knowledge of arcane regulations in order to find that the reports contain false statements counsels against concluding that Section 1001 reaches such "statements."

The next hurdle for the government to overcome in the due process analysis relates to the "causation" requirement of 18 U.S.C. § 2(b). Ms. Hsia argues that the indictment does not allege any conduct on her part that could have "caused" the political committees to file false statements, but alleges only that she "knew" that the "individuals named in the report[s] were not the actual contributors." See eg., Indictment at ¶ 43. She further maintains that her *knowledge* that the reports contained false statements is insufficient to establish that she "caused" the false statements to be made. Ms. Hsia is correct, of course, that in order for the government to prove that she "caused" a false statement to be made, it must prove more than mere knowledge of falsity. It must also prove that she took some affirmative action -- engaged in some conduct -- that led the political committees to file statements with the FEC that were false, and that she acted knowingly and willfully. If the indictment alleged only that Ms. Hsia "knew, in truth and in fact, that the individuals named in the report were not the actual contributors," see e.g., Indictment at ¶ 43, Ms. Hsia certainly would be entitled to dismissal of the false statements counts.

The indictment does slightly more than Ms. Hsia suggests, however. It tracks the language of the statute and alleges that Ms. Hsia "caused the submission of a material false statement to the FEC." See e.g., Indictment at ¶43. In most cases, it would be sufficient to withstand a motion to

dismiss an indictment simply to invoke the statutory word connoting the act or conduct engaged in -- in this case "cause[d] -- along with the mental element required by the statute, "willfully." See Hamling v. United States, 418 U.S. at 117. But where the facts alleged do not clearly constitute the conduct charged, the indictment has not served its purpose of fairly informing the accused of the offense with which she has been charged. See id., United States v. Salisbury, 983 F.2d at 1375 (indictment alleging violation of multiple voting statute must be dismissed where none of facts alleged in indictment clearly constituted multiple voting as commonly understood). Furthermore, in the First Amendment area, due process requires the Court to consider whether the statutes invoked have been impermissibly stretched and too broadly applied. In this case, the First Amendment concerns of Buckley and the overbreadth and vagueness doctrines present insurmountable constitutional impediments to this combined Sections 2(b)/1001 prosecution for causing false statements.

At oral argument, the government proffered that it intends to prove that Ms. Hsia "caused" the political committees to make false statements by soliciting conduit contributions (or, in certain cases, that "she solicited through others") and "in certain instances that she took steps to forward the conduit checks to the respective committees." Transcript at 138-39. According to the government's proffer, Ms. Hsia took the affirmative steps of soliciting conduit contributions and putting conduit checks in the mail or handing them to a representative of the political committee, and she thereby "put into motion a series of events which ultimately led to the false statements being submitted to the FEC." Id. at 138.[31]

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[31] The government's strongest case is set forth in the bill of particulars. Even that "best case" presents only a very weak argument that Ms. Hsia engaged in any willful conduct that caused the political committees to

The problems with the government's theory abound. First, the checks themselves do not make any assertions as to whether the person who signed the check was the true source of the contribution, and since a check is not an affirmative statement of anything, it cannot make any affirmative misrepresentations. Williams v. United States, 458 U.S. 279, 284 (1982) (signature on check implies only factual assertion that drawer will make good on obligation if bank refuses to honor check; signature is not factual assertion at all and does not even imply that sufficient funds are in account to cover check); United States v. Elliot, 689 F.2d 178, 180-81 (10th Cir. 1982) (same; conviction reversed and remanded with instructions to dismiss indictment). Furthermore, since a contributor has no obligation to disclose any identifying information to the political committee or to the FEC and may simply not respond when the political committee meets its minimal statutory obligation of asking for such information, Republican Nat'l Comm. v. Federal Election Comm'n, 76 F.3d at 406, the signature on the check is not an indication of anything more than that the signatory signed the check; it says nothing about whose money is being conveyed by the check that is presented. Cf. Brontson v. United States, 409 U.S. 352, 357-58 (1973) (unresponsive statement, even if intended to deceive, insufficient to sustain conviction of perjury). Absent some additional affirmative conduct, Ms. Hsia's solicitation

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make false statements to the FEC: Ms. Hsia allegedly solicited and collected money from various individuals and provided the money she solicited to other individuals ("straw" or "conduit" donors) who signed checks in particular amounts, leaving the payee line blank; Ms. Hsia or someone else at her direction then wrote in the name of the political committee and forwarded the checks to the committee. Bill of Particulars at 14-15. The bill of particulars adds the fillip that she did so "knowing that the committee would report the contributions to the FEC as having been made by the conduits," id., a statement that relates only to her knowledge and adds nothing to the *conduct* the government intends to prove at trial.

and delivery or mailing of checks could not have "caused" the political committees to make false statements.[32]

While the government may have an argument that Ms. Hsia's actions were a "but for" cause of the alleged false statements, there comes a point when the causal links are so attenuated that a "but for" causal connection is not enough under the Due Process Clause to hold someone criminally responsible for a particular outcome. In a case with no First Amendment implications, perhaps the meaning of Section 2(b) causation could be stretched to cover the kind of conduct alleged as the government proposes. Given the pervasive First Amendment ramifications at stake here, however, Section 2(b) cannot be so distorted.[33]

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[32] The knowing and willful intent requirement presents an additional obstacle for the government in this case. This Court previously has held that the prosecution must prove that Ms. Hsia "knew of the [political party] treasurers' reporting obligation, that [she] attempted to frustrate those obligations, and that [she] knew [her] conduct was unlawful." Opinion of August 13, 1998 at 5 (internal citations and quotations omitted). It is difficult, if not impossible, in the context of this indictment to imagine how the government possibly could prove that Ms. Hsia knew, at the time that she took whatever acts exposed her to Sections 1001 and 2(b) liability, that under the complex reporting scheme imposed on political committees, the listing of a name from a check might be deemed a "false statement" and that her solicitations might "cause" the political committees to make those false statements.

[33] Count 6 of the Indictment is the only count that alleges that Ms. Hsia herself acted as a conduit contributor and that she signed and submitted a check to the political committee. This allegation, not present in Counts 2-5, strengthens the government's argument that there is a causal connection between Ms. Hsia and the political committee with respect to the conduct alleged in this count. The Court nonetheless concludes that it would still require a significant broadening of Section 2(b) to cover this conduct because the check that Ms. Hsia signed still makes no affirmative statement that she is the true contributor. Moreover, the fact that Ms. Hsia is one step closer to the statement made by the political committee does not

All of this is not to say that the government may not criminally prosecute the conduct alleged in the indictment under a narrowly drawn statute. But when general criminal statutes are used in an attempt to impose criminal liability in an area that is both First Amendment-sensitive and highly technical and complex, the Court must guard against the risk that legitimate and protected speech will be chilled, that a prosecutorial net, thrown broadly, will ensnare the innocent for unknowing or technical violations and will engender fear among those seeking to engage in legitimate protected First Amendment activity. See Buckley v. Valeo, 424 U.S. at 76-77; Cantwell v. Connecticut, 310 U.S. at 308.[34]

The Court is not unmindful that even in areas of First Amendment concern, the expansive constitutional guarantees of fair notice, required both of the indictment and of the criminal statute at issue, and the constitutional protection against overly broad constructions of statutes are neither often nor lightly used by the courts to dismiss an indictment or reverse a conviction. Often these doctrines provide "little more than atmospherics," and the courts "do not tolerate judicial rewriting of otherwise validly enacted criminal statutes." See United States v. Nofziger, 878 F.2d at 456 (Edwards, J.

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alter the fact that it is nearly impossible to find that the reports imply any "false" assertions.

[34] The first count of the indictment, which charges conspiracy to defraud the FEC and the INS, is an example of a legitimate use of a provision of the general Federal Criminal Code to charge a violation in a First Amendment-sensitive area. The indictment clearly alleges a conspiratorial agreement, and it clearly alleges that the objects of the agreement were to obstruct specific functions of the FEC and the INS. See supra at 37-39. Thus, while the conduct charged in the indictment touches on areas of First Amendment sensitivity, the Court finds that the straightforward application of Section 371 to this conduct does not require an unconstitutionally overbroad construction of the statute.

dissenting). These doctrines gain true significance and substance, however, in those rare cases when an indictment so distorts a criminal statute that the words of the statute lose all meaning. It simply is not true that when the government uses a word, that word means what the government chooses it to mean. When faced with such an indictment, a court has the obligation to restore some boundaries to the words of the statute.

The remoteness of Ms. Hsia's position in relation to the FEC, the case law with respect to "literal truth," the fact that a check is not a statement, and the willful intent hurdle discussed in a previous opinion in this case together make it impossible to conclude that Sections 1001 and 2(b) can be applied consistently with the Constitution to the conduct alleged here. Any finding that Sections 1001 and 2(b) proscribe the conduct alleged in Counts 2-6 would require an unconstitutionally overly broad and vague reading and application of those statutes.

The Court therefore concludes that they do not reach the conduct alleged in this indictment and that Counts 2-6 must be dismissed. The Constitution requires no less.

An Order consistent with this Opinion will be issued this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 9/10/99

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 98-0057 (PLF)
MARIA HSIA,	)	
Defendant.	)	

ORDER

For the reasons stated in the Opinion issued this same day, it is hereby

ORDERED that Counts 2-6 of the indictment are DISMISSED; it is

FURTHER ORDERED that defendant's Motion No. 2 (to Dismiss Counts in the Indictment for Their Positive Repugnance to the Federal Election Campaign Act) is DENIED; it is

FURTHER ORDERED that defendant's Motion No. 3 (to Dismiss Count 1 of the Indictment for Failure to State an Offense) is DENIED; it is

FURTHER ORDERED that defendant's Motion No. 9 (to Dismiss Indictment Because it Offends the First Amendment) is DENIED; and it is

FURTHER ORDERED that defendant's Motion No. 10 (to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia) is DENIED.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 9/10/98

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v	)	CR. NO. 98-57-PLF
MARIA HSIA, a/k/a "Hsia Ling,"	)	
Defendant.	)	

Order Dismissing Count One

Considering the Motion to Dismiss Count One filed by the United States, the response thereto, and all prior proceedings in this case, it is hereby

ORDERED that the charges contained in Count One of the Indictment be and hereby are dismissed; and it is further

ORDERED that the charges remaining in the Indictment be redacted to reflect that dismissal, in the form set forth in Exhibit 2 to the Government's Motion to Dismiss Count One (absent the bracketed cross-references to the paragraphs of the original Indictment).

Washington, D.C., this 28th day of September, 1999.

United States District Judge

FILED: August 2, 1999

United States Court of Appeals
For The District Of Columbia Circuit

No. 98-3114

September Term, 1998
98cr00057-01

United States of America,
Appellant

v.

Maria Hsia,
Appellee

Consolidated with 98-3125

BEFORE: Williams, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed July 2, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

FILED: August 2, 1999

United States Court of Appeals
For The District Of Columbia Circuit

No. 98-3114 September Term, 1998
98cr00057-01

United States of America,
Appellant

v.

Maria Hsia,
Appellee

Consolidated with 98-3125

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judges Wald and Garland did not participate in this matter.

RELEVANT STATUTORY PROVISIONS

2 U.S.C. § 437g. Enforcement

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission

shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i)

occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or

temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to

act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(10) Repealed. Pub.L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357.

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not

more than $5,000.

(b) Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports

Before taking any action under subsection (a) of this section against any person who has failed to file a report required under 434(a)(2)(A)(iii) of this section for the calendar quarter immediately preceding the election involved, or in accordance with 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by Attorney General of apparent violations

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater

of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether--

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

Supreme Court, U.S.
FILED
DEC 20 1999
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(2)

No. 99-680

In the Supreme Court of the United States

MARIA HSIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prosecution for causing political committees to submit materially false statements to the Federal Election Commission, in violation of 18 U.S.C. 1001 and 2(b), requires proof that the defendant knew her conduct was unlawful.

2. Whether conduct that violates provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, must be prosecuted under FECA's criminal enforcement provisions, or may be prosecuted under general federal criminal provisions in Title 18 of the United States Code.

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In the Supreme Court of the United States

No. 99-680

MARIA HSIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 176 F.3d 517. The opinions of the district court (Pet. App. 20a-52a and 53a-113a) are reported at 24 F. Supp. 2d 14 and 24 F. Supp. 2d 33.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1999. A petition for rehearing was denied on August 2, 1999 (Pet. App. 117a). The petition for a writ of certiorari was filed on October 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of Columbia indicted petitioner on, *inter alia*, five counts of causing political committees to submit materially false statements to the Federal Election Commission (FEC), in violation of 18 U.S.C. 1001 and 2(b). The district court dismissed the false statement counts, and the court of appeals reversed. Pet. App. 1a-19a.

1. a. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1000 to any candidate with respect to any election, and may contribute no more than $25,000 to political committees in any calendar year. 2 U.S.C. 441a(a)(1)(A) and (C); 2 U.S.C. 441a(a)(3). Corporations are prohibited altogether from making contributions in connection with federal elections. 2 U.S.C. 441b. To ensure that the Act's contribution limitations are not easily evaded, FECA provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another." 2 U.S.C. 441f. Further, the Act requires political committees to keep detailed records of their financial activities, and to file periodic reports with the FEC disclosing, *inter alia*, the name, mailing address, occupation, and employer of each "person who makes a contribution" to the committee and whose aggregate annual contributions exceed $200. 2 U.S.C. 431(13), 434(b)(3)(A). Pet. App. 2a-3a, 9a; Gov't C.A. Br. 3-4.

The FEC administers FECA and has exclusive jurisdiction over civil enforcement. 2 U.S.C. 437c(b). The

Act gives the FEC the power to assess civil penalties for any "violation" of the Act, and enhanced penalties for a "knowing and willful" violation. 2 U.S.C. 437g(a). FECA also provides criminal penalties for certain "knowing[] and willful[]" violations, up to a maximum of one year imprisonment, a fine, or both. 2 U.S.C. 437g(d)(1)(A). Gov't C.A. Br. 5.

b. Petitioner is an immigration consultant in the Los Angeles area. The International Buddhist Progress Society (IBPS), which operates the Hsi Lai Temple in Hacienda Heights, California, is a tax-exempt religious organization incorporated in California and prohibited from participating in political campaigns under 26 U.S.C. 501(c)(3). The indictment alleges that petitioner funneled money from IBPS and others into various political campaigns by using straw contributors. Petitioner either would find and solicit individuals to serve as nominal contributors or ask others (including IBPS) to do so. Some of the conduits were nuns, monks, and volunteers from IBPS, while others were friends and associates of petitioner. In one instance, petitioner herself acted as a straw contributor. The nominal contributors were reimbursed in full by the actual contributors, including IBPS. The indictment alleges that petitioner thereby caused IBPS and others to make illegal contributions to political campaigns. Pet. App. 3a; Gov't C.A. Br. 6-8; Indictment ¶¶ 1, 2, 20-21, 27-28, 31-33, 36-39, 40(t)-(v), (y)-(bb), (ff)-(pp); Bill of Particulars at 13-20.

Counts Two through Six of the Indictment charge that petitioner willfully caused the political committees that were the recipients of the conduit contributions to submit materially false statements to the FEC, in vio-

lation of 18 U.S.C. 1001 and 2(b).[1] The political committees filed reports listing the conduit contributions as being from their nominal sources, although the true source was either IBPS or petitioner's immigration clients. Pet. App. 4a; Gov't C.A. Br. 7-8.

2. The district court dismissed Counts Two through Six, the false statement counts. The court questioned whether the statements alleged in the indictment—the names of the "contributors" in the political committees' reports—could have been false, since, in the court's view, a report by a political committee that a particular individual is a contributor is false only if the committee knew that the named individual was not the real contributor. Pet. App. 106a. The court also doubted that the indictment alleged conduct by petitioner "that could have 'caused' the political committees to file false statements," *id.* at 108a, in part on the ground that it believed that the First Amendment limited the extent to which ordinary theories of causation could be applied in the FECA context. *Id.* at 111a. Finally, the court noted that, in its view, showing that petitioner acted knowingly and willfully under Sections 1001 and 2(b) for causing a false statement to be made would require proof that she knew that her conduct was illegal—*i.e.*, that she "knew of the [political party] treasurers' reporting obligation, that [she] attempted to frustrate those obligations [*sic*], and that [she] knew [her] conduct was unlawful," Pet. App. 111a n.32, and the court stated that "[i]t is difficult, if not impossible * * * to imagine how the government possibly could prove"

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[1] Count One of the indictment charged petitioner with a conspiracy to defraud the FEC, in violation of 18 U.S.C. 371. Pet. App. 4a. That count was dismissed on the government's motion after the case was remanded to the district court.

those facts in this case. *Ibid.* Taking all of those factors together, the court determined that to hold that Sections 1001 and 2(b) proscribed the conduct alleged here would violate the Constitution. *Id.* at 113a. It accordingly dismissed the false statement counts.

In so doing, the court did not rely on petitioner's contention that the Federal Election Campaign Act "impliedly repeals the more general provisions of the Federal Criminal Code, specifically the false statements statute, 18 U.S.C. § 1001," and that this prosecution therefore must be brought either under FECA or not at all. Pet. App. 57a-72a. "[T]here is no inconsistency between FECA and the general criminal provisions employed by the government here," the court explained, "[n]or is there *any* indication in the language or legislative history of FECA to indicate that Congress intended the criminal provisions of the Act to displace any of the more general federal criminal provisions in Title 18 of the United States Code." *Id.* at 71a.

3. The court of appeals reversed. Pet. App. 1a-19a. The court held that the political committees' reports, by listing the names of the conduits—rather than the actual sources of the funds—as the contributors, contained "false" statements. *Id.* at 9a-12a. The court explained that FECA's "demand for identification of the 'person . . . who makes a contribution' is *not* a demand for a report on the person in whose name money is given; it refers to the true source of the money." *Id.* at 10a. The court of appeals also concluded that petitioner, by soliciting and in some cases relaying conduit contributions to the political committees, could have "caused" the filing of false statements and that therefore "the case fits comfortably within the clear and previously accepted scope of §§ 2(b) and 1001." *Id.* at 6a-8a. The court of appeals also rejected petitioner's

claim that First Amendment considerations required dismissal of the false statement counts. The court found that petitioner's conduct in soliciting unlawful conduit contributions did not involve constitutionally protected expression. *Id.* at 12a-13a.

With respect to the issues presented in the petition for certiorari, the court of appeals held that the government was not required to prove that petitioner knew her conduct was unlawful. The court reasoned that because petitioner was charged with causing a false statement offense, the government could establish the necessary mens rea "simply by proof (1) that [petitioner] knew that the statements to be made were false (the mens rea for the underlying offense—§ 1001) and (2) that [petitioner] intentionally caused such statements to be made by another (the additional mens rea for § 2(b))." Pet. App. 6a. The court accordingly held that "nothing in the indictment's allegations contradicts the government's capacity to prove the statutorily required mens rea." *Ibid.*

In addition, relying on the settled presumption against repeal by implication, the court of appeals agreed with the district court that FECA did not impliedly repeal Sections 1001 and 2, insofar as those provisions apply to the charge that an individual has caused false statements to be made by political committees. Pet. App. 13a-14a.[2] The court explained

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[2] The court of appeals also held that petitioner's cross-appeal of the district court's refusal to dismiss the conspiracy count (Count 1), was not properly before it. Pet. App. 14a-16a. Judge Rogers concurred in the court's decision not to entertain petitioner's cross-appeal, although she would not have reached all of the grounds addressed by the majority. *Id.* at 16a-19a. As noted above, see note 1, *supra*, the government voluntarily dismissed Count 1 after the court of appeals' decision in this case.

that it "will not find repeal [by implication] absent 'clear and manifest' evidence that it was intended." *Id.* at 13a. The court concluded that "[petitioner] presents no evidence of this sort." *Ibid.*

ARGUMENT

Petitioner contends that there is a conflict in the circuits that warrants further review of the court of appeals' holding that the government need not prove that petitioner knew her acts were unlawful in order to convict her on the false statement counts. Review of that narrow legal issue is not justified at this time and in any event would be premature in this case. Petitioner is scheduled to go to trial imminently, and petitioner's claim, which essentially involves the content of the instructions that will be given to the jury, would more appropriately be considered after any resulting conviction, when the issue will be presented in a concrete factual setting and with the benefit of specific instructions to review.

Petitioner also argues that the false statement counts must be dismissed because, in her view, the FECA is the exclusive means of enforcing compliance with the federal election laws. The decisions of both courts below rejecting petitioner's contention are correct, and there is no conflict with any decision of any other court of appeals. Further review of that question is therefore not warranted.

1. The court of appeals in this case held that, in a "conduit contribution" campaign finance case brought pursuant to Sections 1001 and 2(b), the government must prove that the defendant intentionally caused statements to be made that she knew to be false, but that the government need not prove that the defendant knew that her conduct was illegal. Petitioner contends

(Pet. 12-17) that proof of knowledge of illegality is required. Petitioner claims that the court of appeals' ruling conflicts with this Court's decision in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), and that of the Third Circuit in *United States* v. *Curran*, 20 F.3d 560 (1994).

a. The false statement statute, 18 U.S.C. 1001, requires proof that the defendant "knowingly and willfully" made a materially false statement, and that the statement was made in a matter within federal agency jurisdiction. *United States* v. *Leal*, 30 F.3d 577, 584 (5th Cir. 1994), cert. denied, 513 U.S. 1182 (1995). The term "knowingly" requires the government to prove that the defendant was aware the statement was false when she made it. *United States* v. *Steinhilber*, 484 F.2d 386, 389-390 (8th Cir. 1973); see also *United States* v. *Bakhtiari*, 913 F.2d 1053, 1059-1061 (2d Cir. 1990) (citing cases), cert. denied, 499 U.S. 924 (1991); *United States* v. *Oakar*, 111 F.3d 146, 158 (D.C. Cir. 1997) (Williams, J., concurring in part and dissenting in part). The term "willfully" in Section 1001 has been consistently interpreted to mean that the defendant acted "deliberately" in conveying false information to another, but it too does not require proof that the defendant knew that making the statement was illegal. See, *e.g.*, *United States* v. *Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). See also *Cheek* v. *United States*, 498 U.S. 192, 209 (1991) (Scalia, J., concurring) (noting the general rule that "willfully" "refers to consciousness of the act but not to consciousness that the act is unlawful"). Indeed, "defining the term 'willfully' in a Section 1001 prosecution to require a knowing violation of the law would circumvent the holding of *United States* v. *Yermian*, 468 U.S. 63, 68-76 (1984), that actual knowledge of federal agency jurisdiction is not required to prove a violation of § 1001." *United States* v. *Daughtry*, 48 F.3d

829, 831 (4th Cir.), vacated on other grounds, 516 U.S. 984 (1995).

This Court's decision in *Ratzlaf* does not support petitioner's contention that Section 1001 requires proof that petitioner knew her conduct was illegal. *Ratzlaf* involved the statutory prohibition against structuring currency transactions "for the purpose of evading" certain reporting requirements. The Court held that the criminal prohibition against "willfully violat[ing]" the anti-structuring provision required proof that the defendant knew that the structuring was unlawful. See 510 U.S. at 138, 149. The Court in *Ratzlaf* relied significantly on the consideration that the underlying provision required a "purpose of evading" the structuring law, so that "willfully" would be superfluous if read to require only deliberate action; the Court did not establish a per se rule that a conviction for "willful" acts requires proof that the defendant understood the illegality of his conduct. To the contrary, the Court recognized that the term "willful" is a "word of many meanings," and "its construction [is] often . . . influenced by context." *Id.* at 141. Indeed, the *Ratzlaf* Court explicitly reaffirmed the "venerable principle" that ignorance of the law is not a defense. *Id.* at 149. See also *Bryan* v. *United States*, 524 U.S. 184, 193-196 (1998) (declining to apply *Ratzlaf*'s definition of "willfully" to 18 U.S.C. 924(a)(1)(D)). Following *Ratzlaf*, the courts of appeals have continued to hold that the term "willfully" in Section 1001 means deliberate action, not knowledge that the conduct pursued is unlawful. *Daughtry*, 48 F.3d at 831-832; *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1048 n. 21 (5th Cir. 1994) (en banc).

The fact that petitioner was charged under Section 2(b), which contains its own "willfulness" requirement,

does not alter the result. Section 2 does not itself define a substantive offense, but rather "describes the kinds of individuals who can be held responsible for a crime." *United States* v. *Armstrong*, 909 F.2d 1238, 1243 (9th Cir.) (citation omitted), cert. denied, 498 U.S. 870 (1990). Under Section 2(b), an individual who causes an intermediary to commit a crime is culpable himself, so long as he possesses the intent to commit the underlying offense. *United States* v. *Gabriel*, 125 F.3d 89, 98 (2d Cir. 1997); *United States* v. *Michaels*, 796 F.2d 1112, 1117-1118 (9th Cir. 1986), cert. denied, 479 U.S. 1038 (1987). Accordingly, "an indictment [under Section 2(b)] is sufficient if it alleges the criminal intent required for the substantive offense." *United States* v. *Cook*, 586 F.2d 572, 575 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979). Thus, as the court of appeals properly held, the requirement in Section 2(b) that the defendant "willfully cause[d]" an offense means only that the defendant intended to bring about the act constituting the crime, see, *e.g.*, *United States* v. *West Indies Transport, Inc.*, 127 F.3d 299, 307 (3d Cir. 1997), cert. denied, 118 S. Ct. 700 (1998), not that he must know that his conduct is unlawful, see, *e.g.*, *United States* v. *Michaels*, 706 F.2d at 1117-1118.

b. Petitioner correctly notes (Pet. 12) that the Third Circuit has held that, when the government proceeds under Sections 2(b) and 1001 in a federal election law prosecution, "[t]he intent element differs from that needed when the prosecution proceeds directly under Section 1001." *United States* v. *Curran*, 20 F.3d at 567. According to the Third Circuit, "a proper charge for willfulness in cases brought under Sections 2(b) and 1001 in the federal election law context requires the prosecution to prove that defendant knew of the treasurers' reporting obligations, that he attempted to

frustrate those obligations, *and that he knew his conduct was unlawful.*" *Id.* at 569 (emphasis added). The *Curran* court relied on what it perceived to be similarities between the currency reporting laws at issue in *Ratzlaff* and the federal election statutes. *Ibid.* The court did not explain how its view that Sections 1001 and 2(b) require proof of knowledge of illegality in the federal election law context can be squared with settled interpretations of both statutes, which establish that neither requires proof of knowledge of illegality in other contexts. See *United States* v. *Gabriel*, 125 F.3d at 101-102 (rejecting *Curran* and holding that "the considerations that led the *Ratzlaf* Court to interpret 'willfully' to require a knowing violation of the law under section 5322 are of little aid in interpreting section 2(b).").

The disagreement between the District of Columbia Circuit and the Third Circuit does not warrant further review. The court of appeals' ruling is interlocutory in nature, since its effect is simply to send the case back for trial in the district court. The district court has set a trial date of January 18, 2000, and it has indicated that it intends to swear in the jury at some time after January 24, 2000. Petitioner is in the same position she would have been if the district court had denied her motion to dismiss, thus permitting the trial to proceed and preserving petitioner's right to raise her claim regarding the correct construction of the statute on appeal of any resulting conviction. At that time, moreover, petitioner will be able to present all of her claims in a single petition, thus avoiding piecemeal litigation.

Premature resolution of the issue petitioner seeks to raise is particularly inappropriate. The question whether the government must show that petitioner

knew that her conduct was illegal is a question that concerns the proper framing of jury instructions in this case. In *Curran*, the Third Circuit addressed that question on appeal from a final conviction, where it had before it the full record of the trial and the precise jury instructions that had been given. See 20 F.3d at 569-570. The question presented in this case can similarly best be considered in a more concrete factual setting and with the benefit of the precise jury instructions that were given.

Finally, the difference in practice between the positions of the District of Columbia Circuit and the Third Circuit on this issue is not necessarily great. In a conduit contribution case brought under Sections 1001 and 2(b), both courts require the government to prove that the defendant caused, and intended to cause, a political committee to make a statement (that the named individual is the contributor) that the defendant knew to be false (in that the individual named as the contributor is not the true source of the funds). In order to prove the defendant's knowledge that that statement is false, the government ordinarily will have to show that the defendant knew that the political committee's listing of a particular person as the contributor means that that person was "the true source of the money," rather than "the person in whose name money is given." Pet. App. 10a. Thus, although the court of appeals in this case held that the government need not prove that the defendant knew that making that kind of false statement is illegal, in cases like this the government will ordinarily show that the defendant had some knowledge of the law in order to show the defendant's knowledge of falsity. That "preclude[s] the possibility that criminal penalties [will be] imposed on the basis of innocent conduct." *United*

States v. *Daughtry*, 48 F.3d at 832. And, in practice, the result may be similar to the proof required in the Third Circuit under *Curran*.

2. Petitioner argues (Pet. 17-22) that FECA is the exclusive means of enforcing compliance with its reporting provisions and thus repeals *pro tanto* the more general criminal provisions of the false statements statute, 18 U.S.C. 1001. Both courts below, consistent with every court of appeals that has addressed the issue (including the Third Circuit in *Curran*, see 20 F.3d at 565-566), correctly held that FECA does not repeal by implication the more general provisions of the false statements statute. Further review, especially in the interlocutory posture of this case, is therefore not warranted.

a. It is a "cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); see, *e.g.*, *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986); *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). As the Court has explained, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U.S. at 198. A legislative intent to repeal must be "clear and manifest," and it is not enough to show that a subsequent statute "cover[s] some or even all of the cases provided for by [the prior act]," *ibid.*, or that "the two statutes produce differing results when applied to the same factual situation," *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979). That principle fully applies when conduct violates more than one criminal statute. Absent an "intent to repeal * * * manifest in the 'positive repugnancy'" between two overlapping criminal statutes, decisions as to "[w]hether to prosecute and what charge to file or bring

before a grand jury * * * generally rest in the prosecutor's discretion." *Id.* at 122, 124 (overlapping gun provisions). See also *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).[3]

This case does not justify the invocation of either of the two exceptions to the rule severely disfavoring implied repeals—where there is "irreconcilable conflict" between the two statutes or where "the later act covers the whole situation of the earlier one and is clearly intended as a substitute." *Randall*, 478 U.S. at 661. There is no "conflict" or "positive repugnancy" between the FECA and the false statements statute: FECA imposes limits on contributions to candidates for federal office and requires political committees to keep records of their financial activities and file periodic reports with the FEC disclosing the identity of persons making contributions to the committee. The false statement statute at the time relevant to this case, see Pet. App. 5a n.2, proscribed the willful making of any materially false statement "in any matter within the jurisdiction of any department or agency of the United States." Both statutes define distinct criminal offenses and, by refraining from committing both offenses, individuals may easily comply with both statutes.

Nor does either statute cover "the whole situation" of the other. In order to prove a violation of Section 1001 (or of Sections 1001 and 2), the government has to

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[3] Petitioner's attack (Pet. 7-9, 24) on the evolution of the Department of Justice's approach to prosecution of election campaign violations, as reflected in successive editions of the Department manual, *Federal Prosecution of Election Offenses*, is misdirected. In fact, that evolution reflects cautious consideration, guided by accumulated experience and relevant legal developments, of how prosecutorial discretion might best be exercised in attacking criminal conduct in election campaigns.

prove that a false statement was made—a fact not necessary for proof of a criminal FECA violation under 2 U.S.C. 437g(d), which may simply involve the making of an illegal contribution. And Section 1001 applies to false statements within the jurisdiction of all federal agencies. In order to prove a violation of FECA's criminal prohibitions, by contrast, the government must prove a violation of a provision of the FECA, which of course is not necessary in a prosecution under Section 1001. Each statute thus prohibits substantial conduct that is not prohibited by the other.

Petitioner argues (Pet. 19-21) that Congress intended in enacting FECA to regulate all aspects of campaign finances, and that Congress therefore did not intend that campaign reporting violations would be prosecuted under the false statements statute. But the general rule disfavoring implied repeals has been applied even in situations where Congress has enacted subsequent legislation that may be characterized as "comprehensive" and has also established an administrative agency with regulatory jurisdiction in the area. In *Edwards* v. *United States*, 312 U.S. 473, 484 (1941), the Court summarily rejected an argument that the Securities Act of 1933 repealed the provisions of the mail fraud statute insofar as they covered securities, noting that "[t]he two can exist and be useful, side by side." Similarly, the Court in *United States* v. *Noveck*, 273 U.S. 202, 205 (1927), rejected an argument that a statute prohibiting anyone from "willfully attempt[ing] in any manner to defeat or evade" an income tax impliedly repealed the general perjury statute, insofar as that statute applied to perjurious statements on a tax return. The Court noted that there "was confessedly no express repeal" and that "it is clear that the two sections are not inconsistent." *Id.* at 206. Because the two

offenses "are entirely distinct in point of law, even when they arise out of the same transaction or act," the Court found that the conclusion that "Congress must have intended" an implied repeal "does not follow." *Ibid.* See also, *e.g.*, *United States* v. *Moore*, 423 U.S. 122, 138 (1975) (prosecution for drug distribution rather than for violation of registration provisions); *United States* v. *Tomeny*, 144 F.3d 749 (11th Cir. 1998) (misdemeanor false statement provision of the Magnuson-Stevens Fishery Conservation and Management Act did not preempt felony prosecution under 18 U.S.C. 1001); *United States* v. *Mitchell*, 39 F.3d 465, 471-476 (4th Cir. 1994) (provision of misdemeanors for violation of Endangered Species Act and Department of Agriculture regulations do not preclude felony prosecution for violation of those regulations under 18 U.S.C. 545), cert. denied, 515 U.S. 1142 (1995).[4]

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[4] See also *United States* v. *Parsons*, 967 F.2d 452, 456 (10th Cir. 1992) (false statements to Internal Revenue Service are prosecutable under either Section 1001 or the specific provisions of the Internal Revenue Code); *United States* v. *Bilzerian*, 926 F.2d 1285, 1299-1304 (2d Cir.) (antifraud provisions of Securities Exchange Act do not preclude prosecution under 18 U.S.C. 1001), cert. denied, 502 U.S. 813 (1991); *United States* v. *Jackson*, 805 F.2d 457, 459-464 (2d Cir. 1986) (misdemeanor provisions of 18 U.S.C. 510 do not preclude felony prosecution under general conversion statute, 18 U.S.C. 641), cert. denied, 480 U.S. 922 (1987); *United States* v. *Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) (civil enforcement provisions of Ethics in Government Act did not repeal application of Section 1001 to false statements made in reports filed pursuant to its disclosure provisions), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Brien*, 617 F.2d 299, 309-311 (1st Cir.) (antifraud provisions of the Commodity Futures Trading Act did not preempt or implicitly repeal the general mail and wire fraud statutes), cert. denied, 446 U.S. 919 (1980).

The cases relied on by petitioner (Pet. 18-19) for the proposition that "broad, general criminal statutes do not apply to an area specifically and comprehensively regulated by a targeted statute,"[5] are inapposite. In each of those cases, the court declined to find that the challenged conduct was covered by a "broad, general criminal statute," because the language of that statute did not "plainly and unmistakably" cover the conduct, *Dowling* v. *United States*, 473 U.S. 207, 229 (1985), whereas another, narrower statute squarely targeted such conduct. Unlike the situation in those cases, where there was "ambiguity concerning the ambit" of the broader statute, *ibid.*, there is no question that the false statements statute covers the false reports alleged in this case.

The two other courts of appeals that have considered the precise issue presented here have rejected the contention that campaign reporting violations may be prosecuted only under the misdemeanor provisions of FECA. See *United States* v. *Hopkins*, 916 F.2d at 218 (finding "no indication in the federal election laws that Congress intended them to supplant the general criminal statutes found in Title 18"); *United States* v. *Curran*, 20 F.3d at 566 (noting that "an examination of the legislative history of the Election Campaign Act and its amendments uncovers no express evidence that

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[5] See *Dowling* v. *United States*, 473 U.S. 207 (1985); *United States* v. *Enmons*, 410 U.S. 396 (1973); *Pipefitters Local Union* v. *United States*, 407 U.S. 385, 412 (1972); *United States* v. *Johnson*, 390 U.S. 563, 564-566 (1968); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 291-292 (1960); *United States* v. *Boffa*, 688 F.2d 919, 928-929 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983); *United States* v. *DeLaurentis*, 491 F.2d 208, 214 (2d Cir. 1974).

the Act was intended to preempt the general criminal provisions under 18 U.S.C. §§ 2(b), 371, or 1001").

Petitioner argues (Pet. 21) that the false statement statute cannot be applied to her conduct, which she characterizes as expression protected by the First Amendment, because it "cannot survive strict, or even close, scrutiny." Petitioner argues that "[t]here is no compelling governmental interest" that could justify prosecuting conduit contributions as false statements under Section 1001, rather than as violations of the FECA. *Ibid.* Petitioner, however, is not charged with soliciting political contributions, which is activity protected by the First Amendment. Rather, she is charged in the false statements counts with using conduits to disguise the source of political contributions and thereby causing false representations on a matter within the jurisdiction of the FEC. Such conduct is not immunized by the First Amendment. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); see also *United States* v. *Barker*, 930 F.2d 1408, 1412 (9th Cir. 1991) ("There is simply no constitutional right to file a false claim."); *United States* v. *Daly*, 756 F.2d 1076, 1081 (5th Cir.), cert. denied, 474 U.S. 1022 (1985); *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983). Moreover, although petitioner argues (Pet. 25) that the court of appeals' decision would "chill" legitimate contributors to political campaigns, ample protection for such legitimate contributors is provided by the uniformly recognized requirement that a defendant cannot be held liable for making (or causing) a false statement under Section 1001 unless the government can prove beyond a reasonable doubt that the defendant had actual knowledge of the statement's falsity. Cf. *New York Times* v.

Sullivan, 376 U.S. 254, 280 (1964) (libel against public official relating to official conduct requires proof of "knowledge that [statement] was false or * * * reckless disregard of whether it was false or not").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

Maria Hsia,

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Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000

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[1] Counsel for the parties did not author this brief either in whole or in part and no person or entity, other than the *amicus curiae*, its members, and counsel, have made a monetary contribution to the preparation or submission of the brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a).

affiliate members in all 50 states. The American Bar Association ("ABA") recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are properly construed and applied.

REASONS FOR GRANTING THE WRIT

This case presents a question of fundamental importance to the administration of federal criminal law: what does the word "willfully" mean in 18 U.S.C. § 2(b) and 18 U.S.C. § 1001, two statutes increasingly relied on by federal prosecutors? The court of appeals' reading of "willfully" in this case is inconsistent with this Court's interpretation of that statutory term. Moreover, the courts of appeals are divided on how to interpret the willfulness requirement in the causing false statements/election law context presented here. Each of these discrepancies on its own militates in favor of granting certiorari in this case; taken together, they make the case for review by this Court particularly compelling.

I. REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' DEFINITION OF "WILLFULLY" IN THIS CASE IS INCONSISTENT WITH THIS COURT'S DECISION IN *BRYAN V. UNITED STATES.*

The court of appeals below, reversing the district court, determined that the element of willfulness in 18 U.S.C. § 2(b) does not require the government to show that Petitioner knew her conduct was unlawful – only that Petitioner "intentionally caused" false statements to be made by others to the Federal Election Commission. Pet. App. 5a-6a. That reading of "willfully" is inconsistent with this Court's general understanding of that term, as recently set forth in *Bryan v. United States,* 524 U.S. 184 (1998), and warrants this Court's review. *See* Petition at 17, n. 19.

The *Bryan* case involved the willfulness requirement in 18 U.S.C. § 924, a statute dealing with licensing requirements for firearms dealers. In considering whether that statute required knowledge of criminality, this Court held that "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' [Footnote omitted.] In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" 524 U.S. at 191 (*quoting Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)). This is the precise reading of "willfulness" that the court of appeals rejected here. *See* Pet. App. 6a ("We believe that the government need not prove that [Petitioner] knew her conduct to be unlawful . . . .")

In explaining the intent needed to demonstrate a "willful" violation of criminal law, the *Bryan* Court compared a "knowing" violation of the law with a "willful" violation. Proof of the former, it noted, "merely requires proof of knowledge of *the facts* that constitute the offense." 524 U.S. at 193 (emphasis added). Proving the latter, however, requires evidence of more than mere factual knowledge; rather, "[t]he jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Ibid.*

The court of appeals in this case disregarded the distinction between "knowing" and "willful" violations of the law, interpreting the willfulness requirements of 18 U.S.C. § 2(b) to require only proof of the fact that "the [Petitioner] intentionally caused [the false] statements to be made by another." Pet. App. 6a. This is the kind of factual knowledge that gives rise to a "knowing" violation of the law, not the kind of legal knowledge that the *Bryan* Court found necessary to a more rigorous claim of "willful" violation of the law.[2]

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[2] The false statements statute, 18 U.S.C. § 1001, upon which petitioner's indictment was predicated, requires proof of both "knowing" and "willful" conduct to prove a violation. The court of appeals in this case, therefore, had to consider a statute that by its very terms differentiated between "knowing" and "willful" violations of the law at the same time it considered how to interpret the willfulness requirement of 18 U.S.C. § 2(b). Yet the court of appeals failed to acknowledge that distinction when it came to interpreting the latter statute, and in essence read the willfulness requirements out of both statutes. The Department of Justice, in the very election law context at issue here, has noted that a "knowing and willful" requirement imposes a particularly high bar to proving intent. U.S. Department of Justice, *Federal Prosecution of Election Offenses* 75 (5th ed. 1988).

The court of appeals' deviation from the *Bryan* formulation warrants this Court's review. Such review is needed to confirm this Court's interpretation of willfulness in that case – an interpretation that properly holds the government to a more exacting standard of proof -- and to provide the lower courts with guidance as to the meaning of a term that appears with great frequency in the federal criminal laws. *See Screws v. United States*, 325 U.S. 91, 153-54(1945)(Roberts, Frankfurter, and Jackson, JJ., dissenting)("[The] requisite mental ingredient [required for criminal liability] is expressed in various forms in criminal statutes, of which the word 'willfully' is one of the most common.")

II. REVIEW IS FURTHER WARRANTED BECAUSE THE CIRCUITS ARE DIVIDED ON HOW TO INTERPRET 18 U.S.C. § 2(b)'s WILLFULNESS REQUIREMENT IN THE ELECTION LAW CONTEXT

Even if, as a general matter, proof of a willful violation of the law need not include the defendant's knowledge of the unlawfulness of his conduct, the courts of appeals are squarely divided as to whether such knowledge is required to prove a willful violation in the federal election law context in which this case arises. The D.C. Circuit's determination in this case that knowledge of unlawfulness is not required in a "causing false statements to the FEC" case directly contradicts the decision in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994), in which the Third Circuit, considering the precise false statements/election law charges raised in this case, held that the government must in fact prove that the defendant intended to violate the law. 20 F.3d at 569. The district court in this case followed *Curran*. The court of appeals declined to do so, concluding that *Curran*

deviated "too far" from "the general rule that ignorance of the law is no excuse," Pet. App. 6a, and choosing instead to follow the Second Circuit's interpretation of "willfully" in *United States v. Gabriel*, 125 F.3d 89 (2d Cir. 1997), a non-election law case. *Ibid.*

The division between the courts of appeals on this issue is manifest, and derives directly from the different emphases placed by the courts on the election law context in which both *Curran* and the instant case arose. The courts that have interpreted 18 U.S.C. § 2(b) to require knowledge of criminality in the election law context – such as the Third Circuit in *Curran* and the District Court in this case – have pointed out that the federal election laws, like other laws that the courts have read to require knowledge of criminality, form a complex regulatory framework that criminalizes activity that is not "obviously 'evil' or 'inherently bad'." *Curran*, 20 F.3d at 569 (*quoting Ratzlaf v. United States*, 510 U.S. at 137); *United States v. Trie*, 21 F.Supp. 2d 7, 15 (D.D.C. 1998)). To these courts, the danger that "the complexity and nature of federal election law might ensnare innocent individuals," *United States v. Trie*, 21 F.Supp. 2d at 15, dictates that the government prove knowledge of criminality in election law cases arising under 18 U.S.C. § 2(b). The D.C. Circuit in this case, by contrast, ignored the election law context in favor of the "natural reading of mens rea" that ignorance of the law is no excuse. Pet. App. 6a.

This Court has on several occasions found that the "willful" violation of a complex regulatory statute requires proof that the defendant knew his or her conduct was illegal. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135 (1994)(currency structuring violation); *Cheek v. United*

States, 498 U.S. 192 (1991)(tax violation).[3] The court of appeals in this case, however, interpreted 18 U.S.C. § 2(b)'s willfulness requirement in a vacuum, all but ignoring the election law context in which the case arises. This approach is inconsistent with this Court's precedents, and also with the manner in which the Third Circuit determined the proper intersection between 18 U.S.C. § 2(b) and federal election law. Certiorari is necessary here to resolve this division of opinion.

Election laws are not only complex; they also implicate First Amendment values. *See Buckley v. Valeo,* 424 U.S. 1, 41 (1976)(noting that federal election law context is "permeated by First Amendment interests"); U.S. Department of Justice, *Federal Prosecution of Election Offenses* 40-41 (4th ed. 1984) (recognizing the "presence of First Amendment overtones in nearly all FECA violations.") The constitutionally sensitive nature of the conduct regulated here is an additional reason for strictly interpreting the willfulness element of 18 U.S.C. §§ 2(b) and 1001 when used to criminalize campaign-related activity.

It is particularly imperative that this Court speak to this question in light of the increasing frequency with which 18 U.S.C. § 2(b) is being applied in the election law context generally and the "conduit contribution" context specifically. Over the past decade, the Department of Justice has moved away from prosecuting election law cases under the Federal Election Campaign Act, and has instead employed the false statements statute and 18 U.S.C. § 2(b) as its prosecutorial weapons of choice. *See, e.g., United States v. Hopkins*, 916

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[3] The Department of Justice itself has recognized that "[t]here is nothing inherently wrongful" or "socially deviant" about the conduct prohibited under the federal election laws. U.S. Department of Justice, *Federal Prosecution of Election Offenses* 30 (2d ed. 1980).

F.2d 207 (5th Cir. 1990); *United States v. Goland,* 897 F.2d 405 (9th Cir. 1990); *United States v. Curran, supra.* The instant case is one of several brought by the Department of Justice's Campaign Financing Task Force, which was created to investigate election law violations during the 1996 election cycle. The Task Force has brought 19 indictments and informations, many of which have featured "causing false statements to the FEC" charges like the one at issue in this case. *See* Petition at 24. Resolution of the glaring circuit split highlighted here will provide prosecutors and courts with needed guidance as to the proper application of 18 U.S.C. § 2(b) in election law cases, [4] and will therefore conserve judicial resources and ensure proper administration of the federal criminal laws.

CONCLUSION

For all of the above reasons, the National Association of Criminal Defense Lawyers urges this Court to grant the petition for a writ of certiorari.

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[4] It bears noting that this Court granted certiorari in *Bryan v. United States*, *supra*, because of a similar division between the circuit courts of appeals over the issue of the proper definition of "willfully" in a federal criminal statute. *See* 524 U.S. at 190 (noting disagreement between the Eleventh and Second Circuits regarding the definition of "willfully" in 18 U.S.C. § 924).

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REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

In our Petition, we established two substantial bases upon which the Petition should be granted. First, the D.C. Circuit's decision on the level of intent that must be proved in a "causing false statements" prosecution based on political activity regulated by the Federal Election Campaign Act[1] ("FECA") directly conflicts with the Third Circuit's decision in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994), and that conflict can only be resolved by this Court. Second, Congressional intent and First Amendment concerns require that FECA violations be enforced exclusively pursuant to the carefully calibrated and reticulated FECA statute.

In its Brief in Opposition ("Opp'n"), the government concedes the square split on the important issue of intent and offers no argument as to how the interests of justice would be served by allowing this irreconcilable division in the Circuits to continue. The government also acknowledges that it too viewed FECA as the sole means of addressing FECA violations for the first twelve years of the statute's existence, offering no plausible basis for its radical change of position.

Clearly, it is in the interest of sound and orderly judicial process to resolve the acknowledged conflict as well as to address the threshold question whether FECA's precisely drawn First Amendment-sensitive provisions were intended by Congress as the only means to enforce FECA violations. The Petition should therefore be granted.

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1 2 U.S.C. §§ 431-455.

THE CIRCUITS ARE SQUARELY DIVIDED OVER THE PROPER LEVEL OF INTENT IN A FECA-BASED "CAUSING FALSE STATEMENTS" PROSECUTION

There is a direct and irreconcilable conflict between the decisions of the District of Columbia Circuit, in this case, and the Third Circuit, in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994), on the proper construction of 18 U.S.C. § 2(b)'s "willfulness" in a "causing false statements" prosecution based on a campaign finance violation. The District of Columbia Circuit's ruling that knowledge of unlawfulness is not required is contrary to *Ratzlaf v. United States*, 510 U.S. 135 (1994), in that it risks unfairly ensnaring individuals in criminal liability for unknowing violations of regulatory provisions. This concern is heightened in the First Amendment-sensitive FECA context where Congress has made clear its view that proof of knowledge of unlawfulness is required for any criminal prosecution.

Although the government acknowledges the split in the Circuits (*see* Opp'n at 11), it seeks to evade review through two stratagems. First, it argues that because the procedural posture is interlocutory, review is premature and the case should proceed to trial for factual and legal development. Opp'n at 7. The Court, however, would not be assisted by a "concrete factual setting" or "the benefit of specific instructions to review." *Id.* As the government recognizes, the issue is a *legal* one that the District of Columbia Circuit has fully decided;[2] factual development at

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[2] Because venue exists in the District of Columbia for all charges of "causing false statements" in FEC reports, the government is free to bring all future charges here, making delay even more inappropriate.

trial would neither change nor inform the matter.[3] This Court has granted certiorari prior to trial in the criminal context where, as here, the split is clear and would not be elucidated by further consideration. *See, e.g., Bates v. United States,* 118 S. Ct. 285, 289 (1997). [4]

Second, to minimize the existence of the fully developed conflict between the Circuits and to escape the unconstitutional vice of these prosecutions -- that the innocent may be ensnared -- the government takes the preposterous position that the practical difference flowing from the conflict is insubstantial. Opp'n at 12-13. To characterize the difference in the views of the conflicting courts of appeals -- proof of knowledge of unlawfulness (the Third Circuit) versus no such requirement (the District of Columbia Circuit) -- as insignificant is belied by the fact that the government vigorously argued for the principle of law adopted by the District of Columbia Circuit. The critical nature of the difference in the two distinct views is illustrated by the number of times this Court has been faced with the very issue presented here, in other contexts. *See, e.g., Ratzlaf,* 510 U.S. 135; *Bryan v. United States*, 524 U.S. 184 (1998); *Cheek v. United States*, 498 U.S. 192 (1991). The

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[3] Nor should the imminence of Ms. Hsia's trial have any effect on whether the Court grants the Petition; the government has agreed that the trial will be indefinitely postponed should this Court grant the writ of certiorari.

[4] Indeed, in *Bates*, the Court granted certiorari in the same procedural posture to address a similar "level of intent" issue. After the district court dismissed the indictment, the Seventh Circuit reversed and reinstated the prosecution. Because "[t]he Seventh Circuit's decision conflicts with the Eleventh Circuit's," this Court "granted certiorari to resolve this conflict" even though the government objected that the court could address the split after trial and conviction. 118 S. Ct. at 289.

government's attempt to evade review by running from the consequences of its own position is understandable but ultimately unavailing.

Only by making this spurious claim is the government plausibly able to assert that there is no possibility that criminal penalties will be imposed on the basis of innocent conduct. Opp'n at 14. There are numerous wholly innocent explanations for a "contribution in the name of another" which, in the government's view, is precisely the activity that "causes" the false statement. *See, e.g.*, Pet. at 14 -16; *Curran*, 20 F.3d at 563; *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J.). Significantly, the activity regulated by FECA is political activity many individuals have no reason to believe is regulated or prohibited; "[i]n fact, First Amendment constraints presuppose the opposite view," that is, that the activity is protected from government burden or infringement. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994).

As the Third Circuit has held, a "causing false statements" prosecution in the federal election context falls squarely within this Court's holdings that where a technical regulatory statute carries with it the risk that the innocent may be charged, the government must show that the defendant knew her conduct was made illegal by the statutes in question. *See, e.g., Ratzlaf*, 510 U.S. at 137; *Cheek*, 498 U.S. at 201-02.[5] Moreover, defining "willfully" to mean

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[5] The Opposition interprets *Ratzlaf* as the sole result of the particular statutory language there. Opp'n at 9. The statutory language is no less compelling here. Section 2(b) was amended in 1951 by adding "willfully" to modify "causes." *See United States v. Leppo*, 177 F.3d 93, 95 n.2 (1st Cir. 1999). Section 1001, too, requires proof of "willful" activity. And, FECA itself requires "knowing and willful" conduct, defined by Congress to mean knowledge of the law. The government's

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knowledge of unlawfulness is consistent with the Court's recent opinion in *Bryan*, 524 U.S. at 191, and, contrary to the government's position, is not inconsistent with *United States v. Yermian*, 468 U.S. 63 (1984).

CONGRESS INTENDED FECA TO BE THE EXCLUSIVE MEANS OF ENFORCING FECA COMPLIANCE

Resolution of the threshold question whether FECA is the exclusive means of enforcing FECA compliance would resolve the stark split between the D.C. Circuit and the Third Circuit. To avert review of this fundamental constitutional and statutory issue, the government ignores the anomalous results engendered by the use of the "causing false statements" statutes and fails even to consider the common sense argument that the statutes can be read together as Congress intended, focusing instead on what it calls "implied repeal."[6]

The government does not dispute that for twelve years it too interpreted FECA as the exclusive means of enforcing

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interpretation would render all three statutory provisions nugatory. *See* Brief of The National Association of Criminal Defense Lawyers As Amicus Curiae In Support of the Petition at 3-7 (Dec. 1999).

6 Although Petitioner has not made an implied repeal argument here, the government frames its response entirely in those terms. Even viewed in that framework, however, the "causing false statements" statutes, which were not enacted with First Amendment concerns in mind, are clearly repugnant to FECA's "fine balance of interests . . . deliberately struck by Congress" in its "first-amendment-sensitive" provisions. *Galliano v. United States Postal Service*, 836 F.2d 1362, 1370 (D.C. Cir. 1988).

FECA. While it characterizes its abrupt flip-flop as "cautious consideration, guided by accumulated experience and relevant legal developments" (Opp'n at 14 n.3), a more accurate description of why the government suddenly began prosecuting FECA violations under 18 U.S.C. §§ 2(b) and 1001 is found in its own Manual where it recognized that FECA has "many features that render it difficult to use," including FECA's intent requirement, the monetary jurisdictional floor, "complex and confusing venue rules," and the "special three-year statue of limitations." U.S. Department of Justice 1988 Manual, *Federal Prosecution of Election Offenses* 73-75 (5th ed. 1988). In other words, the government decided to use broad, general felony statutes to prosecute FECA violations because it disapproved of the statute Congress enacted as too burdensome.

The government nowhere addresses the bizarre and anomalous result of its position, that a felony "causing false statements" prosecution allows it to meet fewer and less stringent requirements than a FECA misdemeanor charge.[7] Indeed, compelling and irrefutable evidence that Congress intended that political activity regulated by FECA would *not* be subjected to prosecutions under Section 1001 can be found in FECA itself: Congress expressly provided that Section 1001 applies to complaints to the FEC.[8] Had it intended the false statements statute to apply generally to matters regulated by FECA, it would not have made this

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7 Even an FEC civil remedy involving the same conduct would have a higher intent standard than that approved, at the government's behest, by the D.C. Circuit.

8 *See* 2 U.S.C. § 437g(a)(1) ("Any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission. . . . under penalty of perjury and subject to the provisions of section 1001 of Title 18.").

explicit declaration, a statutory provision the government's position renders nonsensical.

Finally, the government begs the ultimate question, dismissing the cases which support our view with the unsupported *ipse dixit* assertion that "there is no question that the false statements statute covers the false reports alleged in this case." Opp'n at 17. That is precisely the question presented in the Petition, one which the Court should resolve in the interest of the rational, orderly administration of FECA, the finely tuned statute intended by Congress to comprehensively regulate campaign financing.[9]

THE FIRST AMENDMENT REQUIRES PROMPT REVIEW OF THE SIGNIFICANT QUESTIONS RAISED BY THE PETITION

In arguing that the First Amendment is irrelevant because it does not protect "false statements," the government attempts to sidestep the significant constitutional issue before this Court. The First Amendment not only supports both bases for granting certiorari, it also requires the Court to address these issues now, rather than post-trial, to avoid the chill to speech which occurs when vague or broad criminal laws are used in an area of First Amendment sensitivity. [10]

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9 The government's reliance on *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990) and *Curran*, 20 F.3d 560, is misplaced: neither court of appeals considered Congressional intent in light of FECA's comprehensive First Amendment-based provisions. Indeed, neither so much as referred to as *Buckley v. Valeo*.

10 As the government well knows, petitioner has never claimed that the political activity alleged is "immunized" by the First Amendment. Opp'n at 20.

Contrary to the government's contention, it is settled that the mere allegation of "falsity" does not cause the First Amendment, or First Amendment concerns, to disappear. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in response to the Alabama Supreme Court's view that "[t]he First Amendment . . . does not protect libelous publications" (*id.* at 264), the Court made clear that it was "compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law." *Id.* at 269. Instead, charges "must be measured by standards that satisfy the First Amendment." *Id.*

As hard as the government tries, it cannot escape this Court's holding that FECA "operate[s] in an area . . . of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. Because it is a ban on the only form of political contributions that would allow contributors to remain anonymous, the prohibition on "contributions in the name of another" "seriously infringe[s] on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. The court has recognized that "public disclosure of contributions to candidates and political parties" burdens the First Amendment because it "will deter some individuals who otherwise might contribute." *Id.* at 68. As Chief Justice Burger observed in *Buckley*, "[s]ecrecy, like privacy, is not per se criminal. On the contrary, secrecy and privacy as to political preferences and convictions are fundamental in a free society." *Id.* at 237. [11]

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[11] The then Chief Justice emphasized that "forcing the disclosure of contributions that are the prime support of new, unpopular, or unfashionable political causes" will plainly have a deterrent effect on potential contributors (*id.* at 240-41) and pointed out several examples of contributions that FECA might deter. *Id.* at 237. The examples provide further evidence that there is nothing inherently evil about a

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Although *Buckley* and its progeny have allowed some modest regulation of political activity, particularly contributions to candidates, that activity does not thereby lose all First Amendment protections. Surely the government does not seriously contend that any regulation of campaign financing, no matter how vague, broad or inhibitory, is permissible. Rather, the activity legitimately may be regulated *only so long as* the particular regulation addresses a compelling governmental interest and regulates as narrowly as possible to meet that interest. Thus, one who makes a "contribution in the name of another," perhaps to avoid a contribution limit, perhaps to avoid a spouse's disapproval, perhaps as a matter of religious practice, is engaging in protected political activity that may be regulated only by a narrowly drawn statute justified by a compelling governmental interest.

"Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Otherwise, "citizens [may] 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Accordingly, concerns of irreparable injury to precious First Amendment rights[12] demand the Court

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"contribution in the name of another" which may be undertaken to avoid disclosure, and which, unless an individual understands the "causing false statements" statute's prohibition, will ensnare the innocent.

12 The risk of irreparable injury to First Amendment rights renders post-trial appeal "inadequate." *See In re Halkin*, 598 F.2d 176, 199 (D.C. Cir. 1979); *see also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Fort Wayne Books v. Indiana*, 489 U.S. 46, 54-57 (1989).

review these issues now, before further harm, further chill to protected speech, association and belief, occurs.[13]

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Petition should be granted.

Respectfully submitted,

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13 The government's view that contributors are not chilled because "legitimate contributors" will not be prosecuted fails to comprehend the nature of this Court's First Amendment jurisprudence. *See* Opp'n at 18. This argument would define away all "chill," no matter how vague or overbroad the law in question.